83-248

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.,

Petitioner,

—v.—

JAY EDWARDS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Steven Glickstein
Mark Platt
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 407-8000

Of Counsel

ALLEN KEZSBOM
425 Park Avenue
New York, New York 10022
(212) 407-8000

Attorney for Petitioner New England Toyota Distributor, Inc.

QUESTION PRESENTED

1. Can a $469,462 damage award—which the court of appeals conceded to be speculative—be sustained when trial counsel filed a timely challenge to the legal sufficiency of the damage evidence in a new trial motion, on the sole ground that no objection had been made to the admissibility of the damage exhibit when it was originally offered?

Statement Pursuant to Rule 28.1

Subsequent to the commencement of the action, Petitioner New England Toyota Distributor, Inc. changed its name to New England Distributors, Inc. and then to Butler Industries, Inc. Petitioner has no parent or subsidiaries. Its principal stockholder, Mr. George A. Butler, owns a substantial interest in Ecocar, Inc., the parent of Econo-Car International, Inc.

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New England Toyota Distributor, Inc. ("NET") respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case, entered May 19, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, affirming in part and reversing in part the judgment of the United States District Court for the District of New Hampshire, is reported at 708 F.2d 814 (Pet. App. 1a).[1] The district court's judgment on a jury verdict is unreported

[1] The citation "Pet. App. ____" refers to the appendix to this petition.

(Pet. App. 19a). The order of the district court denying NET's motion for a new trial is unreported (Pet. App. 23a).

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1983 (Pet. App. 25a), and this petition was filed within 90 days thereafter. 28 U.S.C. § 2101(c) (1976). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

RULE INVOLVED

This petition involves Rule 59 of the Federal Rules of Civil Procedure, which provides in pertinent part:[2]

> **Rule 59. New Trials; Amendment of Judgments**
>
> **(a) Grounds** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.
>
> **(b) Time for Motion** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

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2 The underlying cause of action is based upon N.H. Rev. Stat. Ann. § 357-C (Supp. 1982). Construction of that statute is not involved here since the petition involves a question of federal procedure. We have nonetheless reproduced the pertinent portions of the New Hampshire statute for the Court's convenience (Pet. App. 27a).

STATEMENT OF THE CASE

A. Proceedings Below

On February 10, 1978, Jay Edwards, Inc. ("Edwards") commenced this action against NET and its principal stockholder, George Butler, alleging violations of the Sherman Act, 15 U.S.C. § 1 (1976) (Count I); the Robinson-Patman Act, 15 U.S.C. § 13 (1976) (Count II); the Federal Dealer Day in Court Act, 15 U.S.C. § 1222 (1976) (Count III); the common law of defamation (Count IV); and N.H. Rev. Stat. Ann. § 357-C (Supp. 1982), the New Hampshire equivalent of the Federal Dealer Day in Court Act (Count V). Jurisdiction was based on 28 U.S.C. §§ 1332 & 1337 (1976 & Supp. V 1981).

All but two counts—the Sherman Act claim (Count I) and the claim based on N.H. Rev. Stat. Ann. § 357-C (Supp. 1982) (Count V)—were withdrawn at the conclusion of discovery. The parties proceeded to trial on the two remaining claims on April 6, 1982, in Concord, New Hampshire. A jury trial was held before Senior Judge Irving Hill of the United States District Court for the Central District of California, sitting by designation. At the close of Edwards' case, Judge Hill directed a verdict dismissing the Sherman Act claim.[3] The New Hampshire claim, however, was submitted to the jury, which found in favor of Edwards and awarded $1,419,462—the precise amount of damages demanded in Edwards' damage theory. Judgment was entered on the jury verdict on April 22, 1982 (Pet. App. 19a), which judgment was amended on June 2, 1982, to include $429,997.37 in prejudgment interest (Pet. App. 21a). The final judgment, therefore, totalled $1,849,459.37.

Pursuant to Fed. R. Civ. P. 59, NET filed a timely motion for a new trial on the ground, *inter alia*, that plaintiff's damage theory was irrational and speculative. The district court denied the motion on May 17, 1982, without any ex-

3 The directed verdict had the effect of dismissing George Butler as a defendant since he was not named in the only remaining count.

planation of its reasons therefor (Pet. App. 23a). NET appealed from the denial of its new trial motion as well as from the final judgment.[4]

The court of appeals overturned the major portion of the jury award, covering the period after March 8, 1978 when NET ceased to be Edwards' supplier. 708 F.2d at 822-23 (Pet. App. 11a-13a). It nevertheless upheld, in its entirety, the $469,462 damage award for the earlier period from April 1, 1976 to March 7, 1978 when NET was Edwards' supplier. 708 F.2d at 819-22 (Pet. App. 5a-10a).

B. The Holding of the Court of Appeals

While the court of appeals declined to vacate the jury award of damages for the period when NET was Edwards' supplier, it was clearly troubled by the speculative nature of Edwards' damage theory. Repeatedly the court expressed the view that the award of damages for this period was "exceedingly generous", 708 F.2d at 822 (Pet. App. 10a); that Edwards "may . . . have been overgenerous to itself" in calculating its damages, 708 F.2d at 820 n.5 (Pet. App. 7a); and that "[t]he award reflects annual profits proportionately far greater than Edwards ever made. . . ." 708 F.2d at 819 (Pet. App. 5a). Indeed, the court went so far as to say that: "Were we to write on a clean slate, we might find merit to NET's contentions." 708 F.2d at 819 (Pet. App. 5a).

The court of appeals ruled, however, that "[m]ere generosity of an award . . . does not justify an appellate court in setting it aside. . . ." 708 F.2d at 819 (Pet. App. 6a). The court held that notwithstanding NET's timely new trial motion based on the insufficient *weight* of the evidence, a new trial was "barred by NET's failure to object" to the *admissibility* of Edwards' damage exhibit, 708 F.2d at 819 (Pet. App. 6a):

> "NET argues that Edwards's [sic] damages calculations relied so heavily on groundless assumptions and were so irrational that the jury should not have been allowed to

4 NET's present counsel was substituted for trial counsel on appeal.

> use them. However, the calculations were introduced and described at trial without any objection from NET. At no time was it asserted that the data and suppositions therein—some of which are now attacked as without support in the record—were in fact entirely unsupported and hence inadmissible for the jury's consideration. Nor was it ever put to the judge, while the trial progressed, that plaintiff's damages calculations, all of which were gathered in a single exhibit, were too inaccurate, incorrect, or irrational, as a matter of law, to form the basis of a supportable jury award." 708 F.2d at 819 (Pet. App. 6a) (citations omitted).

Time after time, the court of appeals indicated its agreement with NET's contentions, only to hold that arguments addressing the weight of the evidence could not be raised in a new trial motion in the absence of a trial objection to the admissibility of the evidence.

For example, the court pointed out that although "[t]he accuracy of [Edwards' damage exhibit] obviously turns on whether income from parts, service, etc., rises in direct relation to new car sales . . . [t]here was little evidence that this was so. . . ." 708 F.2d at 819-20 (Pet. App. 6a-7a). However, the court held that this was "[a]n example of an argument *barred* by NET's failure to object below. . . ." 708 F.2d at 819 (Pet. App. 6a) (emphasis added).

At another point, the court described as "sparse" the evidence supporting the critical assumption that Edwards should have been offered or could have sold 300 additional cars annually. 708 F.2d at 820 (Pet. App. 8a). Notwithstanding NET's timely new trial motion, the court held:

> "Both these assumptions were incorporated in the plaintiff's exhibit calculating damages and, as noted, there was never any objection that these or any other assumptions in the exhibit lacked a factual predicate sufficient to permit the jury to weigh the exhibit itself." 708 F.2d at 820 (Pet. App. 7a-8a).

On no fewer than seven separate occasions, the court emphasized the absence of objection as its reason for leaving the $469,462 damage award undisturbed for the period when NET still served as Edwards' supplier. 708 F.2d at 819, 820, 821, 822 (Pet. App. 6a, 7a, 8a, 10a).[5]

The court's ultimate conclusion was that a timely new trial motion was too late to raise a challenge to the speculative nature of a damage award. As the court put it: "[NET cannot] complain that that evidence was legally unacceptable when it did not raise that objection at trial." 708 F.2d at 822 (Pet. App. 10a).

C. Statement of Facts

Edwards is a Toyota dealer in Portsmouth, New Hampshire. Prior to March 8, 1978, NET was the regional Toyota distributor for New England and served as Edwards' supplier.

Edwards based its claim of liability on alleged acts of discrimination in the allocation of cars by NET. Edwards' theory at trial was that NET had favored Bill Dube, Inc. ("Dube"), a nearby Toyota dealer, in the allocation of cars and that, because of alleged similarities between the two dealerships, Edwards should have received allocations equal to those given Dube.[6]

Edwards claimed that the impact of this alleged discrimination was that Edwards received hundreds of fewer cars than it

5 It is significant that in overturning the jury award for the period after March 8, 1978, the court of appeals placed heavy emphasis on the fact that NET moved at trial to strike all evidence relating to that period. 708 F.2d at 822-23 (Pet. App. 11a). This is a further indication that the court relied on the absence of an objection as the basis for sustaining the $469,462 in damages for the prior period.

6 NET maintained throughout the trial and on appeal that Edwards had received the correct number of vehicles to which it was entitled, according to a mathematical formula applicable to all dealers, and that Dube's higher allocations were attributable to Dube's superior sales performance and lower inventory.

should have, and that this resulted in a loss of profits. Edwards presented its calculation of lost profits in a 19-page damage exhibit, which was introduced at trial without objection.

Edwards' damage theory assumed that Edwards should have received 171 additional cars in the last nine months of 1976, 267 in 1977, and 49 in the first two months of 1978.[7] While nearly all of Edwards' damage assumptions were untenable, including the number of cars it claimed it would have sold, the speculative nature of the damage theory is brought home by the astonishing profit Edwards claims it could have made on sales of these additional 487 cars. Edwards' damage theory assumed, without any supporting evidence, that projected increases in new car sales would increase not only profits on the sale of *new* cars—but would increase in direct one-to-one correlation the profits on the sale of *used* cars, parts and service as well. In this manner, the damage theory was able to project a 622% increase in profits on a 93% increase in sales in 1976; a 273% increase in profits on a 70% increase in sales in 1977; and a 537% increase in profits on an 82% increase in sales in 1978.

The lost profit calculations are diametrically opposed to Edwards' real world experience *as revealed in the damage exhibit itself*. The following chart illustrates the glaring discrepancy:[8]

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7 These numbers were computed by assuming that NET should have offered Edwards the same number of cars per month as Dube—an additional 25 cars per month—and reducing that amount by the percentage of cars Edwards refused to accept from NET in the real world. The damage theory then assumed that Edwards would have sold every additional car which it was offered, notwithstanding the fact that Edwards turned down scores of cars from NET and complained that because of the number of dealers in its area, it was "extremely difficult, if not impossible, for the dealers to remain profitable" (Plaintiff's Ex. 72).

8 All of the figures appearing in this section come from the damage exhibit itself and are not in dispute.

	Cars Sold	*Net Profit*
1976 Actual	183 actual	$ 28,242 actual
1976 Damage Theory	354 claimed	203,867 claimed
BUT 1977 Actual	382 actual	86,912 actual
BUT 1978 Actual	357 actual	56,385 actual

In 1976, Edwards received 183 cars during the nine-month damage period and earned a net profit of $28,242, according to the damage exhibit. According to Edwards' theory, it should have received 354 cars; and Edwards projects a profit of $203,867 on those 354 cars. In the *real world* Edwards did receive 382 cars in 1977—or 28 more cars than the 1976 projection. Far from making a $203,867 profit, however, Edwards' real world profit was only $86,912. Accordingly, the jury awarded damages to Edwards on the assumption that Edwards could have earned $203,867 on 354 cars in 1976 when in the real world, Edwards earned only $86,912 on 382 cars in 1977.

Edwards' real life profits in 1978 ($56,385 on 357 cars), 1979 ($12,583 on 310 cars) and 1980 ($29,010 on 323 cars) further demonstrate the untenability of Edwards' assumption that it could have earned $203,000 on 354 cars. As the court of appeals itself observed, "[t]he award reflects annual profits proportionately far greater than Edwards ever made or than Dube achieved even with supposedly full allocations." 708 F.2d at 819 (Pet. App. 5a).[9]

Edwards' damage theory further assumes that profits from parts, service and used car sales go up in a direct one-to-one

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9 The court went on to state:

> "Indeed, Edwards's [sic] own earnings history casts doubt on its estimates. For example, Edwards calculates that in the last nine months of 1976 it should have sold 354 cars (rather than 183), and that it would have earned $203,867 (rather than $28,242). Yet in 1977, when Edwards sold 382 cars, its net profit was only $86,000. The following year it sold 357 cars, almost the exact number estimated for the end of 1976, and made $56,000." 708 F.2d at 819 (Pet. App. 5a-6a).

correlation to increases in new car sales (see p. 7, *supra*). The record is devoid of factual support for this critical assumption, however. To be sure, plaintiff's president, Jay Edwards, testified that there is some undefined relationship between new car sales and sales of used cars, parts and service. Nowhere did Mr. Edwards testify, however, that there is a one-to-one correlation, which is the fundamental premise of plaintiff's damage theory.[10] Nor were any financial records introduced to demonstrate the truth of the proposition. Indeed, the court of appeals noted that although "[t]he accuracy of [Edwards' damage

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10 Mr. Edwards' entire testimony relating to this subject is set forth below.

> Q. Mr. Edwards, why or how was Edwards Toyota injured by receiving an allocation of 28 compared to Mr. Dube's 70?
>
> A. The new automobile to the franchise dealer is the oxygen to his survival. Everything in the dealership revolves around the selling of a new car. That is how we develop used car trades, which we sell, that is how we develop parts sales through cars we sell to customers, that is how we develop our service department through customers who come back for service. And until a new car is delivered to a retail customer we have not had the opportunity to develop the process which makes a dealership successful. (Tr I 88-89).
>
> • • • •
>
> Q. Now, Mr. Edwards, that profit, the net profit is not just on the sale of new cars; is it? That includes the entire dealership.
>
> A. That is right. The dealership's profits for each department are computed in here. They're all run off a per new car basis. The total dealership profit is included in this figure. Parts, service, sales. And then all the dealership's expenses is subtracted here; parts, service, sales, to wind up with the net. (Tr III 58-59).
>
> • • • •
>
> Q. Now, that damage report that's been submitted, the profit that is described in there is not based only upon the sale of new cars; is it?
>
> A. Oh, no.
>
> Q. What else is it based upon?
>
> A. The profit per unit, both actual and projected, are based on the total gross profits of the total dealership operation; parts, service, the used cars that come in trade on the new cars. (Tr VIII 95).

exhibit] obviously turns on whether income from parts, service, etc., rises in direct relation to new car sales . . . [t]here was little evidence that this was so. . . ." 708 F.2d at 819-20 (Pet. App. 6a-7a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE HOLDINGS OF OTHER COURTS OF APPEALS

In asserting the failure of NET's trial counsel to object to the introduction of Edwards' damage exhibit as a ground for leaving undisturbed an admittedly speculative damage award, the First Circuit applied a plainly erroneous legal standard. Inexplicably, the court of appeals applied a rule governing the admissibility of evidence to a question concerning the weight of the evidence—a ruling which is directly contrary to the holdings of the Second and Third Circuits, and implicitly at odds with decisions in the Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits as well.

It is black letter law that, although leeway is permitted in the computation of damages, a "jury may not render a verdict based on speculation or guesswork." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946). Where, as here, a jury has awarded damages that are excessive and unwarranted by the evidence, that award must not be allowed to stand. *See, e.g., Alover Distributors, Inc. v. Kroger Co.*, 513 F.2d 1137, 1141-42 (7th Cir. 1975); *Lanfranconi v. Tidewater Oil Co.*, 376 F.2d 91, 95 (2d Cir.), *cert. denied*, 389 U.S. 951 (1967); *Springfield Crusher, Inc. v. Transcontinental Ins. Co.*, 372 F.2d 125, 126 (3d Cir. 1967); *Flintkote Company v. Lysfjord*, 246 F.2d 368, 389 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); *Whiteman v. Pitrie*, 220 F.2d 914, 919-20 (5th Cir. 1955); *Virginian Ry. Co. v. Armentrout*, 166 F.2d 400, 408-09 (4th Cir. 1948). Refusal to award a new trial under such circumstances constitutes an abuse of discretion. *See, e.g., Lanfranconi*, 376 F.2d at 94; *Springfield Crusher*, 372 F.2d at 126; *Flintkote*, 246 F.2d at 389; *Whiteman*, 220 F.2d at 919-20; *Virginian Ry.*, 166 F.2d at 408-09.

A failure to object to evidence offered at trial is uniformly recognized to mean but one thing—in the absence of plain error, the unobjected-to evidence may be properly admitted and considered by the fact finder. *See* Fed. R. Evid. 103(a)(1). The presence or absence of an objection has absolutely no effect on the weight of the evidence—which is the proper focus of a new trial motion. *See, e.g., Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940).[11] Below, the court of appeals recognized that *the damage exhibit itself* proved that Edwards—even when it had the number of cars it claimed in the damage theory—did not come close to achieving the level of profits it claimed. 708 F.2d at 819 (Pet. App. 5a). It stands logic on its head to say that speculative damages become non-speculative by reason of trial counsel's failure to object to the very damage exhibit which proves their speculative nature.

While the court of appeals stated on several occasions that there was some minimal evidence to sustain the damage award, 708 F.2d at 820-21 (Pet. App. 7a-10a), this holding was based exclusively on the fact that NET did not object to the admissibility of the damage exhibit:

> "We conclude, *taking into account plaintiff's unobjected-to damages exhibit*, that there was a sufficient basis in the evidence for the jury's award during the time NET was the regional distributor." 708 F.2d at 821 (Pet. App. 10a) (emphasis added).

This argument is merely a bootstrap, however. It assumes that if a damage theory is in the record, it is, for that reason alone, rationally supported. Under the First Circuit's decision, a new trial on damages could never be awarded, despite the inadequacies of the damage theory, unless the damage evidence was improperly admitted.

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11 "The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving. . . ."

The court of appeals' holding that a new trial was "barred by NET's failure to object" is directly at odds with holdings in the other circuits.

In *Springfield Crusher, Inc. v. Transcontinental Ins. Co.*, 372 F.2d 125 (3d Cir. 1967), the Third Circuit ordered a new trial on damages in an action on an insurance policy, finding that the jury's award of the full amount of the policy limit "was not reconcilable with the evidence. . . ." *Id.* at 126. The court so held despite the fact that the defendant had posed no objection to the plaintiff's improper testimony on the replacement value of the insured equipment. *Id.* at 127 ("This testimony was plainly irrelevant and inadmissible but the defendant interposed no objection to its introduction."). The Third Circuit nonetheless held that the district court's refusal to award a new trial was an abuse of discretion.

In *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1212-13 (2d Cir. 1981), *aff'g* 463 F. Supp. 983, 1019-20 (D. Conn. 1978), *cert. denied*, 455 U.S. 1016 (1982), the Second Circuit affirmed the trial court's overturning of a jury award in favor of SCM because, as here, the damage theory was based upon assumptions that were contrary to historical facts. There, not only did the defendant not object to the damage exhibit upon which the jury had based its award, the defendant itself *introduced* the exhibit. *See* 463 F.Supp. at 1018 ("The jury award of $230,874 was indisputably based on a calculation that Xerox presented."). The Second Circuit nonetheless held that the damage theory lacked a rational foundation and therefore could not be sustained.

It is therefore indisputable that, at least in the Second and Third Circuits, objection at trial is not a prerequisite to overturning speculative damage awards.

That the other circuits likewise do not impose a threshold "objection" requirement for challenging speculative damage awards is apparent from examining the opinions of the courts of appeals where jury awards have been overturned or new trials ordered. We have been unable to find the slightest hint that the courts of appeals' decisions were in any way in-

fluenced by the presence or absence of objection at trial to the introduction of damage exhibits. *See, e.g., Universal Lite Distributors, Inc. v. Northwest Industries, Inc.*, 602 F.2d 1173 (4th Cir. 1979); *McBrayer v. Teckla, Inc.*, 496 F.2d 122, 126-28 (5th Cir. 1974); *Mitchell Coal Company v. United Mine Workers of America*, 313 F.2d 78 (6th Cir. 1963); *Alover Distributors, Inc. v. Kroger Co.*, 513 F.2d 1137 (7th Cir. 1975); *National Wrestling Alliance v. Myers*, 325 F.2d 768, 775-77, 777-78 (8th Cir. 1963) (majority & concurring opinions); *Flintkote Company v. Lysfjord*, 246 F.2d 368, 389-94 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

The conflict created by the First Circuit's contrary holding has implications far beyond mere injustice in the case at bar. Under the First Circuit's rule, no new trials could be granted in the absence of an erroneous evidentiary ruling by the trial judge, since objection to the admissibility of evidence would become a precondition to challenging its weight on a new trial motion. The inevitable effect of such a rule will be to spur frivolous and unnecessary objections at trial. Litigants wishing to challenge damage theories which are not adequately supported will be uncertain whether a court might seize upon a failure to object as basis for denying a new trial based on the insufficient weight of the evidence. Faced with a Hobson's choice of either filing a premature objection or facing possible preclusion on a subsequent motion for a new trial, lawyers will be inclined to object at every turn, which will serve only to disrupt the proceedings and waste scarce judicial resources.

II. THE DECISION BELOW CONFLICTS WITH THE UNAMBIGUOUS PROVISIONS OF FED. R. CIV. P. 59(b)

The First Circuit's holding flies in the face of a plain reading of Fed. R. Civ. P. 59(b), which explicitly provides ten days *after* entry of judgment to make a new trial motion. Nothing in Rule 59 suggests that the right to a new trial, where the verdict is against the weight of the evidence, is conditioned upon an objection at trial. This is to be contrasted with a motion for judgment n.o.v. pursuant to Fed. R. Civ. P. 50(b), which—unlike Rule 59—requires counsel to take action at trial (*i.e.*, move

for a directed verdict) in order to obtain relief. Accordingly, the First Circuit has applied a new legal rule to new trial motions that has no basis in Rule 59. By filing its motion within the time prescribed by Rule 59, NET undeniably preserved its right to challenge the speculative nature of the damage award.

CONCLUSION

For the reasons stated, a petition for a writ of certiorari should be issued to the United States Court of Appeals for the First Circuit.

Dated: August 16, 1983

Respectfully submitted,

Steven Glickstein
Mark Platt

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 407-8000

Of Counsel

ALLEN KEZSBOM
425 Park Avenue
New York, New York 10022
(212) 407-8000

Attorney for Petitioner
New England Toyota
Distributor, Inc.

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

Argued Dec. 7, 1982

Decided May 19, 1983

No. 82-1539

JAY EDWARDS, INC.,

Plaintiff, Appellee,

—v.—

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.,

Defendant, Appellant.

Allen Kezsbom, New York City, with whom Steven Glickstein, and Kaye, Scholer, Fierman, Hays & Handler, New York City, were on brief, for defendant, appellant.

Daniel A. Lauter, Concord, N.H., with whom Myers & Lauter, Concord, N.H., was on brief, for plaintiff, appellee.

Before:

COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

LEVIN H. CAMPBELL, *Chief Judge*.

Jay Edwards, Inc. ("Edwards"), a New Hampshire Toyota dealership, brought this suit in February 1978 against New

England Toyota Distributor, Inc. ("NET"), which at that time was the regional distributor for Toyota. Of the five counts in the original complaint, three were withdrawn by Edwards at the close of discovery. This left a claim under the Sherman Act, 15 U.S.C. § 1, and a pendent state statutory claim alleging bad faith conduct on the part of NET. At the close of the trial, the district court granted a directed verdict for NET on the federal claim. The state claim went to the jury, which returned a verdict for the plaintiff in the amount of $1,419,462, exactly the sum requested. With the addition of prejudgment interest, the award came to $1,849,459.37. NET's motion for judgment n.o.v., new trial, or remittitur was denied, and with new attorneys it appeals from both that denial and the judgment itself.

The claim that went to the jury was based on the New Hampshire equivalent of the federal Automobile Dealers' Day in Court Act. The New Hampshire statute prohibits a distributor from "engag[ing] in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of such parties or the public." N.H.Rev.Stat.Ann. § 357C:3(I). A distributor may not refuse to deliver reasonable quantities of cars to franchised dealers except for reasons beyond its control. *Id.* § 357C:3(III).

At trial, plaintiff presented evidence of a number of allegedly bad faith actions by NET. The most serious of these was an alleged malicious failure to supply Edwards with the number of cars to which it was entitled. Plaintiff also sought to show that NET had deceived it into withdrawing an objection to a competing franchise; that NET had wrongfully accused Edwards of misconduct in a sales promotion; that NET lied when it claimed a number of undelivered cars had been irreparably damaged in a storm; that NET knowingly filed a false complaint against Edwards with the state Attorney General; and that NET had sent a letter terminating

1 After an investigation, the Attorney General refused to take further action, finding that there was no evidence of substantial illegal practices.

Edwards's franchise for reasons it knew were specious. Throughout this period Jay Edwards, plaintiff's president, was also president of the Toyota Dealer Alliance ("Alliance"), an organization of Toyota dealers unhappy with NET, formed to bargain with it. Plaintiff's theory at trial was that NET's harassment was in retaliation for Edwards's activity as president of the Alliance. It introduced evidence tending to show that other members of the Alliance were also harassed by NET.

Plaintiff's damages claim, and its ultimate recovery, rested exclusively on the alleged misallocation of cars. Edwards claimed that beginning in April 1976, immediately after the Alliance had presented NET with a list of demands, NET disregarded its own allocation formula and "shorted" Edwards. From April 1976 through December 1977, Edwards was offered 527 fewer cars (300 per year) than was Bill Dube, Inc., a comparable New Hampshire dealership that theretofore had received identical allocations. Under Edwards's theory, it should have received what Dube had received. Edwards claimed the profits it purportedly lost because of NET's failure to allocate to it the same number of cars offered Dube. Edwards also sought damages for profits it purportedly lost *after* March 8, 1978, the date on which NET ceased to be the regional distributor. According to Edwards, the reduction in sales resulting from NET's machinations caused the new regional distributor to continue to allocate cars at an unjustifiably low rate.

Plaintiff's calculations of lost profits stemming from NET's shorting of cars were first presented in a 22-page document entitled "damage report" filed during pretrial procedures seven months before trial. The same calculations later went into evidence as plaintiff's exhibit 380. The financial records on which the calculations were based, though never introduced into evidence, had been available to NET during discovery. While NET moved before trial to eliminate other evidence proffered by plaintiff, NET did not object to the damage report, and the report was received into evidence without objection.

Edwards calculated damages as follows. First, it reduced the 300 vehicles it believed it should have been offered annually by its acceptance rate (the number of offered vehicles accepted) for each of the relevant years. It then calculated its gross per unit profit for each of the years by dividing the gross profits of the entire dealership by the number of new cars sold. It multiplied the per unit profit by the number of units (actual and hypothetical) it would have sold, then subtracted certain overhead costs. Some overhead items were assumed to be variable and correspond directly with sales volume (e.g., sales commissions); some were assumed to be semi-fixed (e.g., office supplies); and others were calculated as fixed (e.g., rent, owner's salary). This yielded a total net profit figure, from which was subtracted actual net profit to arrive at lost profits for each year.[2]

I. STATUTORY VIOLATION

The thrust of this appeal is directed at the calculation of damages, not the finding of liability. NET denies that there were any deliberate misallocations, which, if strictly true, would preclude a finding of liability as well as damages. But the jury had before it evidence of troubled relations between Edwards and NET, of possible harassment by NET, and of a

[2] For example, the figures for 1977, during which Edwards had an 89 percent acceptance rate, were as follows:

	Actual (382 Cars)		*Projected (649)*		*Increase*
Gross Profit	$474,369	$1241 per unit	$805,928	$1241	$331,559
Selling Expense	50,258	137	84,922	130	34,394
Departmental Operating Expense	154,185	403	199,158	306	44,973
Overhead	181,091	474	196,405	302	15,314
Deductions	1,948	5	1,948	3	0
Net Profit	86,617	226	323,495	498	236,878

sudden and entirely unexplained disparity between the allocations to Edwards and those to Dube immediately after the Alliance issued its list of demands. NET provided at trial no very clear explanation of the disparity in allocations.[1] Based on the evidence presented to it, it was open to the jury to conclude that NET had engaged in "action which is arbitrary, in bad faith, or unconscionable" and had failed to deliver "reasonable quantities" of automobiles in violation of subsections (I) and (III) of N.H.Rev.Stat.Ann. § 357C:3.

II. DAMAGES

The picture as to damages is less clear. From April 1976 through March 1981 Edwards had total net profits of $210,287. It claims that, had it been offered an additional 300 cars per year, its net profits for that period would have been $1,629,749, and that it was accordingly damaged in the amount of $1,419,462. The jury agreed. Appellant strenuously attacks the size of this award, characterizing it as "totally out of proportion to any alleged wrongdoing by NET or any conceivable injury to the plaintiff."

Were we to write on a clean slate, we might find merit to NET's contentions. The award reflects annual profits proportionately far greater than Edwards ever made or than Dube achieved even with supposedly full allocations. Indeed, Edwards's own earnings history casts doubt on its estimates. For example, Edwards calculates that in the last nine months of 1976 it should have sold 354 cars (rather than 183), and that

[1] In an affidavit accompanying a motion for new trial, a former vice president of NET put forward newly discovered computer printouts that he says do explain the disparity. We consider below whether this evidence was such as to compel the granting of a new trial. Here we point out only that the affiant states that "the discrepancy between the two dealers could not be justified without resort to the actual numbers contained in these documents. . . . Plaintiff's contentions regarding misallocations . . . could not effectively be answered without this material." This only supports the rationality of the jury's conclusion—given the evidence presented to it—that NET, in bad faith, preferentially allocated cars to Dube.

it would have earned $203,867 (rather than $28,242). Yet in 1977, when Edwards sold 382 cars, its net profit was only $86,000. The following year it sold 357 cars, almost the exact number estimated for the end of 1976, and made $56,000.

Mere generosity of an award, however, does not justify an appellate court in setting it aside, and we cannot say that the award here, for the period of NET's distributorship, exceeds "any rational appraisal or estimate of the damages that could be based upon evidence before the jury." *Glazer v. Glazer*, 374 F.2d 390, 413 (5th Cir.), *cert. denied*, 389 U.S. 831, 88 S.Ct. 100, 19 L.Ed.2d 90 (1967); *see also Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 880 (7th Cir. 1970) ("we must affirm unless the findings are beyond the pale of sane judgment"), *cert. denied*, 400 U.S. 1020, 91 S.Ct. 584, 27 L.Ed.2d 632 (1971).

NET argues that Edwards's damages calculations relied so heavily on groundless assumptions and were so irrational that the jury should not have been allowed to use them. However, the calculations were introduced and described at trial without any objection from NET. At no time was it asserted that the data and suppositions therein—some of which are now attacked as without support in the record—were in fact entirely unsupported and hence inadmissible for the jury's consideration. Nor was it ever put to the judge, while the trial progressed, that plaintiff's damages calculations, all of which were gathered in a single exhibit, were too inaccurate, incorrect, or irrational, as a matter of law, to form the basis of a supportable jury award. *See Service Auto Supply Co. of Puerto Rico v. Harte & Co.*, 533 F.2d 23, 25 n. 3, 28 (1st Cir. 1976). *See generally Local 901, International Brotherhood of Teamsters v. Compton*, 291 F.2d 793, 796-97 (1st Cir. 1961).

An example of an argument barred by NET's failure to object below is its criticism that the gross per unit profit set forth in plaintiff's damages calculations was not the dealer mark-up on new cars, but instead was reached by dividing the *total* profits of the dealership—from sales of new and used cars, parts, and accessories, as well as service—by the number of new cars sold. The accuracy of this method obviously turns

on whether income from parts, service, etc., rises in direct relation to new car sales. There was little evidence that this was so—although Jay Edwards testified that the two were related[4] and NET did not dispute it. NET now asserts that "[i]t is black letter law that there must be a *factual* basis for a witness' opinion and Mr. Edwards has wholly failed to provide one." Yet no objection was presented to the district court that the assumption of a one-to-one correlation as set out in plaintiff's damages exhibit lacked a sufficient factual predicate to be considered by the jury. Under these circumstances, we are unwilling to say, as a matter of law, that the jury was barred from awarding damages based on that assumption. *See Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 567 (2d Cir. 1970). *Cf. Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510, 518 (10th Cir. 1976) (willing to assume that increased parts and service income would cover increased overhead expenses).[5]

NET also argues that plaintiff never proved that, under the prevailing formula, NET owed it 300 additional cars annually, or that plaintiff could have sold 300 additional cars annually. Both these assumptions were incorporated in the plaintiff's exhibit calculating damages and, as noted, there was never any

4 We note that the bulk of plaintiff's evidence came from the testimony of Mr. Edwards. In particular, it was Edwards who, with the assistance of an accountant, prepared the damages calculations. In giving his opinion as to lost profits, Edwards was acting essentially as an expert witness. It is not unusual for an officer of a corporate plaintiff to testify as to lost profits, and such "evidence is ordinarily held adequate, without more, to make out a case." *See generally* R. Dunn, *Recovery of Damages for Lost Profits* 2d § 7.2 (1981) (collecting cases).

5 Plaintiff may also have been overgenerous to itself in its estimates of increases in overhead expenses resulting from increased volume. However, some deductions were made for overhead expenses. *Compare Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437 (1st Cir. 1966) (remanding for new trial on damages where no deduction from gross profits made for expenses). *See generally Trabert & Hoefler, Inc. v. Piaget Watch Co.*, 633 F.2d 477, 484 (7th Cir. 1980).

objection that these or any other assumptions in the exhibit lacked a factual predicate sufficient to permit the jury to weigh the exhibit itself. Moreover, there was some, if sparse, evidence in support of each of the two propositions. While NET insists that Dube's higher allocations were the result of Dube's higher sales and lower inventories, there is not much in the record to indicate that this was in fact the case, *see* Part I, *supra*, and the jury was entitled to infer the contrary. The only testimony, from Edwards, was that prior to April 1976, allocations and sales, and therefore inventory as well, were identical for the two dealerships. NET states, however, that even if it really did discriminate against Edwards in favor of Dube, then Edwards should have received 150 of the cars that went to Dube, thus equalizing their allocations. It relies on *David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F.2d 52 (4th Cir. 1974), *cert. denied*, 420 U.S. 992, 95 S.Ct. 1430, 43 L.Ed.2d 674 (1975), for this proposition. But *McGeorge* is factually different—the evidence was clear that there was only a limited number of cars available and that allocations to three other dealers were artificially increased by cars that should have gone to McGeorge. Edwards's theory here, however, was that the allocations to Dube were correct and that, despite NET's denials, NET had surplus cars available with which it could have matched Dube's allocations, or else could have slightly reduced allocations to the other 71 New England dealers. Edwards's support for this proposition consists mainly of his own testimony, but we cannot say the evidence was so negligible as not to constitute a jury question.

NET also argues that even if Edwards had had more cars, it could not have sold them. It points out that Edwards turned down offered cars and at the close of every month had unsold cars on its lot. Jay Edwards offered his own explanation of why offered cars were rejected—essentially, some models were more popular and saleable than others. This was seemingly taken into account in plaintiff's damages calculations by reducing the 300 car figure by the proportion of cars Edwards accepted from among those offered him by NET. Further, Edwards testified that he had sold every car he had ever taken.

Certainly at any given moment, a dealer will have unsold cars on its lot. The jury could have believed this was simply inventory, which did not in itself indicate that the dealer was unable to make sales.

Appellant objects that there was no evidence of unfilled orders or potential customers being turned away. *Cf. Smith v. Babcock Poultry Farms, Inc.*, 469 F.2d 456 (10th Cir. 1972). In a somewhat similar case where this court remanded for a new trial on damages, we commented among other things that the plaintiff had orders for only 25 of the 117 cars it claimed it should have received. *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437. That was not the basis of the new trial order there, however, and we cannot say that evidence of unfilled orders is essential, provided there is some other evidence from which a jury might rationally conclude the dealer would have sold extra cars if it had had them. Here there was testimony from Edwards and another dealer that they could have sold an additional 25 cars a month.[6] Moreover, Edwards did testify that a certain number of customers who had placed orders with him withdrew their deposits and purchased cars from Dube instead when Edwards was unable to fill their orders.

6 Evidence of another dealer's performance is admissible. *See, e.g., Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 567 (2d Cir. 1970); *Wilko of Nashua, Inc. v. TAP Realty, Inc.*, 117 N.H. 843, 379 A.2d 798 (1977). NEI argues, however, that this testimony should have been excluded because there was no showing that the two dealerships were sufficiently similar for the comparison to be legitimate. NEI's counsel did object to this brief testimony at trial, but only on the ground of relevancy. He did not specifically contend that the dealerships were geographically so distant as to make them incomparable, a possibility not necessarily apparent. Unlike the situation in *Farmington Dowel Products Co. v. Forster Manufacturing Co.*, 421 F.2d 61, 82 & n. 48 (1st Cir. 1970), here there was little evidence one way or the other as to comparability. Defendant's counsel, in his objection, brought none to the court's attention, nor did he pursue the matter on cross-examination. In these circumstances, we cannot find that the admission of this testimony was error; once admitted, its weight was for the jury to determine. *See* R. Dunn, *Recovery of Damages for Lost Profits* 2d § 5.8 at 234 (1981).

We conclude, taking into account plaintiff's unobjected-to damages exhibit, that there was a sufficient basis in the evidence for the jury's award during the time NET was the regional distributor. Damages for lost profits need not be proved with mathematical certainty, provided an award has a rational basis in the evidence. *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966). Moreover, where the defendant's wrongdoing created the risk of uncertainty, the defendant cannot complain about imprecision. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946). As the Tenth Circuit stated in similar circumstances, "[g]iven a finding by the jury that [the distributor] discriminated in the allocation of cars, . . . [the distributor] is in an unfavorable position to complain of an uncertainty created by his own wrongdoing." *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d at 517.

Where plaintiff's testimony and calculations were admitted without objection, their accuracy was a matter for the trier of fact. *See Marquis v. Chrysler Corp.*, 577 F.2d 624, 638-39 (9th Cir. 1978); *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d at 566-67. Defendant's remedy was cross-examination, *see Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d at 446, and it "had every opportunity to cross examine [Edwards] and to expose to the jury any inconsistencies, inadequacies and inaccuracies in [his] testimony," *Kingsport Motors, Inc. v. Chrysler Motors Corp.*, 644 F.2d 566, 569 (6th Cir. 1981). Indeed, it did so, pointing out forcefully during cross-examination and summation some of the questionable aspects of plaintiff's proof that have been argued before us. Moreover, NET could have presented witnesses and evidence of its own to indicate what the outer limits of Edwards's damages might have been. "It cannot now complain about the jury's reliance on the only evidence on damages which was presented." *Id.* at 569. Nor can it complain that that evidence was legally unacceptable when it did not raise that objection at trial. The jury's award for the period of NET's distributorship, though exceedingly generous, had a sufficient basis in the record.

III. DAMAGES FOR PERIOD AFTER NET CEASED TO BE DISTRIBUTOR

Plaintiff calculated damages, and the jury awarded them, on the basis of an annual 300 car shortage for five years. That period included three years *after* NET had ceased being the distributor and thus had ceased to have any contact whatever with plaintiff. We conclude that to the extent the award was based on the period after March 8, 1978, it cannot stand. Not only is evidence of damage during this period almost nonexistent, but it stands on a different footing from the overall theory of damages in terms of objection at trial.

In contrast to its silent acceptance of the introduction of evidence of plaintiff's general theory of damages, defendant did object to this aspect of plaintiff's proof. On the final day of the trial it moved that "all testimony and exhibits introduced by the plaintiff relative to damages incurred subsequent to March 8, 1978 be stricken." The district judge denied the motion after brief oral argument at the close of evidence. Although the motion to strike might have been made earlier, *see, e.g., Holden v. United States*, 388 F.2d 240, 242-43 (1st Cir.), *cert. denied*, 393 U.S. 864, 89 S.Ct. 146, 21 L.Ed.2d 132 (1968), it was sufficiently timely to allow the trial judge to consider whether this evidence could go to the jury and to preserve NET's rights on appeal.

A plaintiff must establish that the defendant's conduct caused the injury of which it complains. *E.g., Hangar One, Inc. v. Davis Associates, Inc.*, 121 N.H. 586, 590, 431 A.2d 792, 795 (1981). The link between misallocations by NET and those alleged to have occurred after NET left the picture is not obvious, for one would think that TMD, the new distributor, would be responsible for its own allocations. However, Edwards contends now, as it did to the jury, that because NET's willful misallocations reduced its sales, the allocation formula became skewed against it. As a result, incorrect allocations were built into the formula and continued long after NET was the one doing the allocating.

This theory is not necessarily implausible. Testimony at trial suggested that once a dealer's "travel rate" (i.e., his recent sales record) is depressed it may be difficult for him to regain his prior position. *See also Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, 14 Mass.App. 396, 440 N.E.2d 29, 35 n.9 (Mass.App.1982). Assuming that NET did short Edwards cars, the effects could conceivably have been felt after TMD took over the distributorship. However, no evidence was introduced to show that TMD used the same formula as NET. Indeed, the evidence relative to this period was simply insufficient for a rational jury to ascertain that the volume of cars Edwards then obtained constituted a "misallocation" relative to what other comparable dealers were receiving. Significantly, during TMD's distributorship, Edwards's sales steadily *declined* from the level they had reached during NET's distributorship, while, with the exception of 1979, its acceptance rate rose every year, reaching 100 percent in 1981. TMD was thus offering Edwards fewer and fewer cars. Something else was clearly at work during these years besides any residual misallocations from the NET period. In light of the declining sales and allocations, the likelihood that at some point the formula would recover from prior shortages, and the general paucity of meaningful information as to what was happening to other dealers and in the market, we think the jury could not supportably have concluded that Edwards had during these three years continued to be shorted to the extent of 300 cars annually due to prior misconduct of NET.

Even assuming the jury could supportably infer the existence of *some* residual damages, Edwards had an affirmative burden, as plaintiff, to introduce evidence from which their amount could be approximated. *E.g., Kolb v. Goldring, Inc.*, 694 F.2d 869, 874 (1st Cir.1982); *Grant v. Town of Newton*, 117 N.H. 159, 162, 370 A.2d 285, 287 (1977). Instead, Edwards simply asked the jury to assume that the disparity between Dube and itself remained unchanged, that it was shorted 300 cars annually throughout this period, and that all this was somehow due to NET's prior wrongdoing. There is no evidence of what Dube's own actual allocations during this

period were, nor does Edwards suggest any other benchmark against which its allocations can be evaluated. We think the claimed damages left, at this point, the realm of "just and reasonable inference" and entered that of "pure speculation or guesswork." *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1964).

Because the jury so clearly accepted plaintiff's damages calculations, the unjustified portion of the award is easily identified. There can be no dispute as to the amount of these damages: Edwards proved none. *See generally* 6A *Moore's Federal Practice* ¶ 59.08[7] (1983). Calculation of the excess is mechanical. Prorating the 1978 total for the period after March 8 and adding that amount to the figures for 1979-1981 gives a sum of $951,387.16, which we round down to $950,000. Accordingly, we order the award of damages reduced by that amount. We remand to the district court for recalculation of prejudgment interest on the remaining sum, the damages being deemed to have occurred between April 1976 and March 8, 1978.

IV. EVIDENTIARY RULINGS

At trial, plaintiff introduced evidence that the brother of NET's chairman had been convicted of warranty fraud at his Chevrolet dealership and lost his Toyota dealership as a result. The asserted relevance of this evidence was that NET's patience with the brother was so much greater than with Edwards, who was sent a termination letter in circumstances far less grave, that it tended to show bad faith on the part of NET in its dealings with Edwards.

Had NET objected on grounds of prejudice, *see* Fed.R.Evid. 403, we might have questioned the admission of this evidence. The only stated ground of objection was relevancy, however, and we cannot say that the termination was completely irrelevant. As the objection failed to alert the trial court to the prejudice theory, we will not review that argument here. *See Bryant v. Consolidated Rail Corp.*, 672 F.2d 217, 220 (1st Cir.1982); *see generally Brookhaven Landscape & Grading Co.*

v. J.E. Barton Contracting Co., 676 F.2d 516, 573 (11th Cir.1982); 1 *Weinstein's Evidence* ¶ 103[02] at 103-21 to 103-22 (1982).

Appellant also claims that the district court admitted prejudicial hearsay testimony regarding the Federal Trade Commission's refusal to take action on a complaint lodged with it by the Alliance. Jay Edwards stated that an FTC employee had told the Alliance's lawyer, who had told Edwards, that the FTC was staying its hand because a private class action against NET was pending. NET's nonspecific objection at trial was overruled. It now asserts that this was inadmissible hearsay, and prejudicial in that it created the impression that 1) the FTC believed NET was guilty, and 2) that NET was in constant trouble with its dealers. We agree that, as an initial matter, the statement would not have been admissible. However, we conclude that it was cumulative and harmless. *See deMars v. Equitable Life Assurance Society of the United States*, 610 F.2d 55, 62 (1st Cir.1979). The day before Edwards gave the testimony of which NET complains, he gave substantially identical testimony, without objection, while being questioned by defense counsel. Moreover, as discussed below, there was extensive other evidence of poor relations between NET and its dealers.

NET also claims that the district court erred in admitting arguably prejudicial testimony and correspondence concerning disputes between NET and five other dealers. Four were directors of the Alliance (which seems to have had only a handful of directors) and the fifth a member. The court ruled at the pretrial conference that it would allow this evidence over NET's objection. The other dealers did not testify that they were shorted cars, but did describe harsh treatment by NET after formation of the Alliance and its protests against NET. Two Alliance directors were sent termination letters, subsequently withdrawn; NET commenced a warranty investigation of the third; and it sent a somewhat threatening letter objecting to the location of the fourth. (An identical letter, sent to the fifth dealer, was also introduced.) NET contends that this was

impermissible evidence of other wrongs, *see* Fed.R.Evid. 404, and was in any event unduly prejudicial, *see id.* 403.*

We do not think this evidence simply portrayed unrelated "bad acts" (NET in fact denies that the conduct was improper at all). *See* Advisory Committee Notes to Rule 404(b). Rather, by suggesting a pattern of retaliatory practices against Alliance members, it was probative of NET's motive and intent, and its possible bad faith, in dealings with Edwards. *See Bob Maxfield Motors, Inc. v. American Motors Corp.*, 637 F.2d 1033, 1039 (5th Cir.) (misallocation), *cert. denied*, 454 U.S. 860, 102 S.Ct. 315, 70 L.Ed.2d 158 (1981); *Miller v. Poretsky*, 595 F.2d 780, 784-85 (D.C.Cir.1978) (evidence of past racial discrimination by defendant landlord admissible in Fair Housing Act action); *id.* at 790-91 & n. 12 (Robinson, J., concurring). The district court was entitled to conclude, without abusing its discretion, that the permissible probative value of the evidence outweighed any prejudice. *See generally Dente v. Riddell, Inc.*, 664 F.2d 1, 5 (1st Cir.1981).

Finally, the district court refused to allow NET to introduce evidence from its own records that Dube's and Edwards's sales for January through March of 1976 were not as close as Edwards claimed. That evidence, as the court said, was "basic and critical . . . in explaining and justifying [NET's] allocations to its dealers." The court held, however, that these records should have been produced during discovery and could not be sprung on the plaintiff at the last minute. The court did not abuse its discretion in excluding this evidence. The parties had entered into a pretrial agreement as to the exhibits they

* Appellee argues that NET stated its objection as "relevance" during the pretrial conference and therefore waived any other argument. A fair reading of the transcript, however, refutes this contention. NET's counsel stated that the proffered evidence was "an effort to prove that defendants did something by showing that they did the same alleged activities to someone else, which is normally not permitted except in narrow areas." Defendant's motion in limine contended that "experiences of other dealers are not relevant, and reference to them is designed to invoke an improper inference regarding defendant's treatment of the plaintiff."

were to present. The agreement did not include this evidence. It was within the discretion of the district court to hold the parties to compliance with the pretrial stipulation. *See Newman v. A.E. Staley Manufacturing Co.*, 648 F.2d 330, 333 (5th Cir.1981); *United States v. Rayco, Inc.*, 616 F.2d 462, 464 (10th Cir.1980); *Simonsen v. Barlo Plastics Co.*, 551 F.2d 469, 471 & n. 3 (1st Cir.1977).

V. MOTION FOR NEW TRIAL

Except with respect to the damages awarded for the period after March 8, 1978, the verdict was not so clearly against the weight of the evidence as to constitute a manifest miscarriage of justice requiring a new trial. "The authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court," *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980) (per curiam), and we cannot say that discretion was abused here. *See Hubbard v. Faros Fisheries, Inc.*, 626 F.2d 196, 200 (1st Cir.1980).

NET's motion for a new trial was based not only on the arguments already considered but also on newly discovered evidence and an accompanying affidavit from a former NET vice-president. The affiant stated that when NET lost its distributorship it ceased operations, its records were dispersed, and many of its personnel took employment elsewhere, making it impossible to track down all the relevant documents. Following the return of the large verdict against NET, the affiant was roused to action and was able to find computer sheets showing that the allocations to Dube and Edwards were in fact equivalent in that each dealer was provided with a more or less equal days' supply of cars. Because Dube's inventory was lower and sales rate higher, allocations to it were greater. The affiant is "convinced that the information contained in the documents in question conclusively answers the plaintiff's contentions regarding misallocations, and that such contentions could not effectively be answered without this material."

A motion for new trial on the ground of newly discovered evidence will generally be granted only where the movant was

excusably ignorant of the facts despite exercising due diligence to uncover them. *See generally* 11 Wright & Miller, *Federal Practice and Procedure* § 2808 (1973). We cannot be impressed by the diligence of a party that fails to uncover evidence during four years of discovery that it manages to retrieve four weeks after losing the lawsuit. Moreover, this is not significantly new evidence. Allocations were based on sales and inventory. Both these figures appear in the financial records of the dealerships and so were, or should have been, known at the time of trial. In addition, the sales records, at least, were available in NET's records. *See* page 824, *supra*. Thus, appellant now seeks to rely on information that has been available to it all along by presenting it in a new format.[8] Indeed, appellant explicitly argues that other materials, known at the time of trial, prove that the allocations were proper. Thus, the computer printouts, according to appellant, reveal nothing not already known. This is not the sort of "newly discovered" evidence that requires a new trial. *See Owens v. International Paper Co.*, 528 F.2d 606, 611 (5th Cir.1976).

The judgment is reduced by the sum of $950,000 and, as so reduced, is affirmed. The case is remanded for recalculation of prejudgment interest consistent herewith.

[8] Armed with the sales and inventory figures from the financial records of the dealerships, counsel might perhaps have been able to calculate what the allocations should have been under the NET formula. If so, it could have presented the jury with exactly the sort of evidence on the basis of which it seeks a new trial.

APPENDIX B

Judgment of the District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action File No. 78-49-D

JAY EDWARDS, INC.

—v.—

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Irving Hill Senior, United States District Judge, Sitting by Designation, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the Plaintiff.

It is Ordered and Adjudged that damages are assessed in the sum of One Million Four Hundred Nineteen Thousand Four Hundred Sixty Two ($1,419,462.00).

Dated at Concord, this 22nd day of April, 1982.

s/ WILLIAM H. BARRY
Clerk of Court

cc: Daniel Lauter, Esq.
William L. Cowin, Esq.
James C. Wheat, Esq.

APPENDIX C

Amended Judgment of the District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

No. Civil 78-49-D

JAY EDWARDS, INC.,

Plaintiff,

—v.—

NEW ENGLAND TOYOTA DISTRIBUTOR, INC., et al.,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION TO AMEND JUDGMENT TO INCLUDE PREJUDGMENT INTEREST

Pursuant to jury verdict, judgment was entered on April 22, 1982, for Plaintiff in the amount of $1,419,462. By letter to the Clerk dated May 3, 1982, Plaintiff's counsel moved to amend the judgment by adding to the amount of the jury verdict the sum of $595,396.17. That sum was calculated by computing interest at straight 10% per annum not compounded from the date of filing the complaint, February 10, 1978, to the date of the jury verdict, April 22, 1982. The addition of this sum to the judgment is sought by virtue of a New Hampshire statute, RSA 524:1-b, which provides that an interest allowance shall be included in all judgments in all civil proceedings in which pecuniary damages are recovered.

Defendant does not dispute that the New Hampshire statute applies to the instant award. Defendant does not dispute that the judgment should now be amended to provide for interest thereunder.

Defendant's sole objection to the motion is as to the method of computing the award.

Defendant asserts that the correct amount of prejudgment interest is $429,997.37.

By letter to the Clerk of June 1, 1982, Plaintiff accedes to the amount as suggested by Defendant.

THEREFORE, IT IS ORDERED AS FOLLOWS:

1. Plaintiff's motion is granted. The judgment shall be amended *nunc pro tunc* to April 22, 1982, by adding to the amount of the jury verdict the additional sum of $429,997.37 as prejudgment interest. The total judgment as amended will thus be $1,849,459.37.

2. The Clerk shall transmit a copy of this Order by United States mail to counsel for both sides.

DATED: June 2, 1982, at Anchorage, Alaska.

/s/ IRVING HILL

Irving Hill, Judge
United States District Court
Sitting by Designation

cc: Howard B. Myers, Esq.
James C. Wheat, Esq.
William I. Cowin, Esq.

APPENDIX D

Order of the District Court Denying Motion for New Trial

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

No. Civil 78-49-D

JAY EDWARDS, INC.,

Plaintiff,

—v.—

NEW ENGLAND TOYOTA DISTRIBUTOR, INC., et al.,

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL TREATED AS ALTERNATIVE MOTION FOR NEW TRIAL, FOR JUDGMENT N.O.V. OR MOTION FOR REMITTITUR

Defendants' motion denominated "MOTION FOR NEW TRIAL" filed in the District Court for the District of New Hampshire under date of April 29, 1982, has come before the Court. The Court notes that the relief sought in said motion is in the alternative and includes, the granting of a new trial, judgment N.O.V., or remittitur. The Court treats the motion as an alternative one seeking all three types of relief. The Court has read and considered said motion together with Defendants' evidentiary material and memorandum of Points and Authorities in support thereof. No hearing is necessary or appropriate. Plaintiff is not required to file any further briefing or evidentiary material in opposition to said motion.

IT IS ORDERED AS FOLLOWS:

1. Said motion is denied in all respects.

2. The Clerk of the U.S. District Court for the District of New Hampshire shall transmit a copy of this Order by United States mail to counsel for both sides.

DATED: May 17, 1982, at Los Angeles, California.

/s/ IRVING HILL

Irving Hill, Judge
United States District Court

cc: Daniel Laufer, Esq.
William I. Cowin, Esq.
James C. Wheat, Esq.

APPENDIX E

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1539

JAY EDWARDS, INC.,
Plaintiff, Appellee,

—v.—

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.,
Defendant, Appellant.

JUDGMENT

Entered: May 19, 1983

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is reduced by the sum of $950,000.00 and, as so reduced, is affirmed and the cause is remanded to that Court for recalculation of prejudgment interest consistent with the opinion filed this day.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

APPENDIX F

Statute

STATUTE

N.H. REV. STAT. ANN. § 357-C (Supp. 1982)

357-C:3 Prohibited Conduct. It shall be deemed an unfair method of competition and unfair and deceptive practice for any:

> I. Manufacturer, factory branch, factory representative, distributor, distributor branch, distributor representative or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of such parties or to the public.
>
> • • • •
>
> III. Manufacturer; distributor; distributor branch or division; factory branch or division; or any agent thereof to:
>
> (a) Refuse to deliver in reasonable quantities and within a reasonable time after receipt of dealer's order, to any motor vehicle dealer having a franchise or contractual arrangement for the retail sale of new motor vehicles sold or distributed by such manufacturer, distributor, distributor branch or division, or factory branch or division, any motor vehicles covered by such franchise or contract and specifically advertised by such manufacturer, distributor, distributor branch or division, or factory branch or division, to be available for immediate delivery; provided, however, that the failure to deliver any motor vehicle shall not be considered a violation of this subparagraph if such failure is due to an act of God, work stoppage or delay due to strike or labor difficulty, shortage of materials, freight embargo, or other cause over which the manufacturer, distributor, or any agent thereof, shall have no control.

No. 83-248

In the Supreme Court of the United States

OCTOBER TERM, 1983

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.,
PETITIONER,

v.

JAY EDWARDS, INC.,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

DANIEL A. LAUFER
MYERS AND LAUFER
4 Park Street
Concord, NH 03301
(603) 228-1151
Attorneys for Respondent

Blanchard Press, Inc., Boston, Mass.—Law Printers

Counter-Statement of the Question Presented

The petitioner's statement of the question presented attempts to create a new legal theory where none existed before. The Court of Appeals below simply decided that upon a review of all the evidence, most of it unobjected to by petitioner, the jury's award of damages for the years petitioner was a supplier of respondent was supported by the evidence. Now petitioner attempts to construe that holding as one in which the Court of Appeals ruled that a failure to object to the admission of evidence of damage at trial bars an appellate review of the sufficiency of the evidence of damage supporting an award. That was not the issue below nor is it here. Indeed the proper statement of the issue here is:

1. Should this Court grant a petition for a writ of certiorari in a case where the motion for a new trial did not challenge the sufficiency of the evidence supporting the verdict and in which both the trial court and the Court of Appeals determined there was sufficient evidence to support a jury verdict?

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In the
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OCTOBER TERM, 1983

No. 83-248

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.,
PETITIONER,

v.

JAY EDWARDS, INC.,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Respondent Jay Edwards, Inc. ("Edwards") submits this opposition to the Petition of New England Toyota Distributor, Inc. ("NET") for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit issued May 19, 1983.

Counter-Statement of the Case

A. NET FAILED TO FILE A TIMELY MOTION FOR A NEW TRIAL ON THE ISSUE OF WHETHER THE WEIGHT OF THE EVIDENCE SUPPORTED THE DAMAGE AWARD.

With one exception, Edwards has no quarrel with NET's description of the procedings below which is found at pages 3 and 4 of its Petition. The exception is NET's claim, on the bot-

tom of page 3, that it "filed a timely motion for a new trial on the ground, *inter alia*, that plaintiff's damage theory was irrational and speculative." A copy of that motion is included as Appendix A attached hereto. In truth, NET's motion was based upon five grounds, not one of which dealt with damages awarded for the period when NET was Edwards' supplier of cars, which award was upheld below. The first ground related to the assessment of damages for the period *after* NET was no longer the supplier. The last four grounds involved evidentiary questions pertaining primarily to the issue of liability. Since the portion of the damage award upheld by the Court of Appeals below was only for the time period when NET *was* Edwards' supplier, the motion for a new trial is clearly irrelevant to this Petition. Not until it filed its memorandum in support of its motion for a new trial, did NET raise the issue of the sufficiency of the evidence supporting the award. However, that memorandum was not filed until May 13, 1982, or some 21 days after the judgment was entered. Even if the memorandum can be considered a motion for a new trial, which it cannot, it is clear that NET failed to make a timely motion challenging the weight of the evidence supporting the award of damages for the period when it was the distributor because Fed.R.Civ.P. 59 (b) requires such a motion to be made within ten days of the entry of judgment. Therefore, the basis for NET's Petition is procedurally defective and for that reason alone, the Petition should be rejected.[1]

Counter-Statement of the Facts

Edwards is presently the Toyota dealer in Portsmouth, New Hampshire, and has been since 1973. From 1973 until March 8, 1978, NET was the regional distributor of Toyotas for New England and was Edwards' sole supplier of cars.

[1] Edwards never raised this point below because NET appealed from the judgment below, which appeal included the issue of sufficiency of the evidence. See Defendant's Notice of Appeal attached hereto as Appendix B.

Edwards claimed, and proved, that NET engaged in various bad faith acts against Edwards because Edwards helped form and then lead a group of dealers protesting NET's practices. The bad faith acts NET committed included, among others, the initiation of a baseless investigation of Edwards by the New Hampshire Attorney General's office, an attempted termination of Edwards's Toyota franchise and an intentional, discriminatory reduction in the number of cars allocated by NET to Edwards. The reduction in allocation was proven almost entirely by use of NET's own documents and it formed the basis of Edwards' damage claim.

NET allocated the cars it distributed to dealers according to a formula which took into account the sales history of a dealer for the prior 60 or 90 days and the amount of inventory the dealer had on hand. The purpose of the formula was to give each dealer an equal days supply of cars to sell given each dealer's sales record in the past 60 or 90 days. Edwards proved that it and a neighboring dealer had almost equal sales and identical allocations for the three months prior to the beginning of the discriminatory allocations in April of 1976. In all allocations after April 1, 1976, Edwards was denied cars offered the other dealer. The result was that Edwards was allocated 527 cars less than it should have been during the period April, 1976, to December, 1977, or some 25 cars a month.[2] For the period April, 1976, until NET stopped being the distributor in March of 1978, Edwards calculated it should have been offered an additional 25 cars a month, or 300 cars per year. Then, Edwards applied its acceptance rate, i.e., that percentage which reflected the number of cars Edwards actually accepted each year of those cars actually offered to it.

Having determined how many cars it would have taken had it been offered the additional cars it deserved, Edwards then reviewed its actual income and expenses to determine what

[2] No allocation records exist for the periods prior to January, 1976 or after December, 1977.

additional net profits it would have earned. The calculations were done by Jay Edwards, president of Edwards, who had over 20 years experience in the automobile business, including 10 years as president of Edwards. Edwards' acountant, Cushman Colby, who had over 30 years experience as an accountant for car dealerships, reviewed both the calculations and the assumptions regarding increases in revenue and expenses and concurred in their accuracy. Both men testified at length on the issue of damages and were sufficiently persuasive to the jury and the trial judge as well as the Court of Appeals.

In contrast to Edwards' carefully prepared report presented by two experts, NET presented no contradictory evidence. No expert was offered by NET to challenge either the assumptions in the damage report or the method of calculation. No comparisons to other dealers or industry averages were ever introduced by NET. NET merely cross-examined Edwards' experts making some of the same points it does here. In fact, NET never objected to either the report or the experts' testimony. Yet, NET now claims the damage report and other evidence presented by Edwards is not of sufficient weight to support the jury award. A simple reading of the opinion of the Court of Appeals herein demonstrates why NET's arguments are without merit.

The entire thrust of NET's claim herein is that the evidence submitted by Edwards without objection from NET is of insufficient weight to support the jury verdict. After noting in footnote 6 at page 9a (Pet. App. 9a)[3] of the opinion that Edwards' president was qualified to give expert testimony on damages and such testimony alone would support a verdict, the Court of Appeals held that where both testimony and calculations are admitted without objection, the weight to be given such evidence is for the trier of fact. NET's remedy, as the court pointed out at pages 6a and 10a (Pet. App. 6a, 10a), was to cross-examine vigorously, present its own experts and

[3] All references marked Pet. App. refer to Petitioner's Appendix page numbers.

evidence, and, most importantly, object to Edwards' exhibits and testimony at trial as being inaccurate. As described before, NET did nothing except cross-examine Edwards' experts. Therefore it cannot now be heard to claim there is insufficient evidence to support an adverse result.

Reasons for Not Granting the Writ

I. NET Failed To Make a Timely Motion for a New Trial Under Rule 59(b) of the Federal Rules of Civil Procedure.

The verdict was returned on April 21, 1982, and judgment was entered on April 22, 1982. NET filed a motion for a new trial on April 29, 1982. The motion did not raise the issue of whether or not there was sufficient evidence in the record to support the damages awarded for the period prior to March 8, 1978. See Appendix A attached hereto. That issue was first raised in NET's memorandum in support of the motion for new trial which was not filed until May 13, 1982. Fed.R.Civ.P. 59(b) allows 10 days after entry of judgment in which to make a motion for a new trial. Even if NET's memorandum were to be considered such a motion, it would be fatally flawed because it was not filed until 21 days after entry of judgment. Thus, NET's entire Petition is based upon a procedural rule with which it failed to comply.

II. The Judgment of the Court of Appeals Is Correct and Should Not Be Reviewed.

The verdict of the jury pertaining to the period before March 8, 1978, was supported by the damage exhibit and the testimony of two experts, both of whom were fully qualified as experts and intimately knowledgeable about Edwards's financial condition and operating capacity. In addition, the award was supported by NET documents concerning allocations and another dealer's sales testimony. Yet, NET, in an attempt to

shift the focus away from its failure to do anything at trial, continually refers to only the damage report when it discusses evidence supporting the award.

This Court has ruled that a corporate plaintiff may prove its damages through the testimony of a corpoate officer. *Story Parchment Co.* v. *Patterson Co.*, 282 U.S. 551 (1931). At trial herein, not only did a corporate officer testify for plaintiff, but an expert accountant did as well. In addition, documents from NET and testimony from another dealer were introduced in support of the damage claim. The Court of Appeals, in assessing all the evidence, correctly ruled that the verdict was supported by the evidence. The court specifically held at page 10a (Pet. App. 10a) that where an expert presents an assumption to a jury without objection from the opposing party, that assumption may be accepted by the jury in assessing damages. This is especially true where the opposing party chose only to cross-examine the expert and failed to present any evidence of its own. The holding is consistent with prior decisions of other courts. *Kingsport Motors, Inc.* v. *Chrysler Motors Corp.*, 644 F.2d 566 (6th Cir. 1981); *Marquis* v. *Chrysler Corp.*, 577 F.2d 624, 638-39 (9th Cir. 1978); *Autowest, Inc.* v. *Peugeot, Inc.*, 434 F.2d 556, 566-67 (2d Cir. 1970); NET's failure to object to the evidence offered by Edwards now bars NET from claiming the evidence is inadmissible. Since the evidence was properly admitted and two courts have held it to be sufficient to support the award of damages, NET cannot claim any prejudice. *Service Auto Supply Co. of Puerto Rico* v. *Harte & Co.*, 533 F.2d 23, n.3, 28 (1st Cir. 1976).

III. The Pending Action Has No Significance Beyond an Adjudication of the Dispute Between the Parties.

A. *There Is No Conflict Among the Holdings of Other Courts of Appeal.*

NET claims the Court of Appeals ruled that failure to object to evidence at trial bars motions for new trials based on insufficiency of supporting evidence. That is incorrect. The court

merely held that evidence was admitted into the record without objection from NET. Given that evidence was properly admitted, the resulting jury award was not beyond the pale of sane judgment and therefore the award was upheld. *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 880 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). The court below merely applied the usual rule in deciding, on appeal, the question of sufficiency of the evidence. What the court also did was point out that the evidence supporting the award was in the record *because* NET failed to object. Although NET may find that embarrassing, it is certainly no reason for this Court to depart from accepted principles of procedure.

Not one of the cases cited by NET as conflicting with the judgment herein is relevant to the issue presented below or the decision of the Court of Appeals. NET cited numerous cases as support for various general propositions of law, but the holdings of only two of the cases cited could, even applying NET's creative interpretations, be arguably inconsistent with the holding of the Court of Appeals below. A quick review, however, demonstrates the holdings are not inconsistent. In the first case, *Springfield Crusher, Inc.* v. *Transcontinental Ins. Co.*, 372 F.2d 125 (3rd Cir. 1967) the Court of Appeals for the Third Circuit ordered a new trial because the jury award was not in accord with the evidence. In addition, that court said, at page 127, that certain evidence offered by plaintiff and not objected to by defendant should not be admitted at the new trial because it was plainly *irrelevant* and *inadmissible*. That, NET claims, is a holding opposite to the decision here in the court below that the evidence was clearly *relevant* and *admissible* and was sufficient to support the jury award. Clearly, the two cases involve different factual circumstances. Indeed, the only similarity between the two cases is the inaction of the defendants. The evidence in this case was relevant and admissible and therefore completely different in nature from the evidence in the *Springfield* case.

The second case cited by NET is *SCM Corp.* v. *Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982). In that case, the Court of Appeals for the Second Circuit upheld a trial court's reversal of a jury verdict in favor of plaintiff on the grounds the evidence of damages was insufficient. Both the plaintiff and the defendant had introduced damage theories estimating how many machines plaintiff would have sold but for defendant's acts. The trial court rejected both theories as impossible in view of the uncontroverted testimony on sales. In this case, in an inept analogy to the *SCM* v. *Xerox* holding, NET claims that "uncontroverted" evidence similarly conflicts with the damage report offered by Edwards at trial. NET has, however, made this argument before, and has failed to persuade anyone of its soundness. Neither the jury, the trial court, nor the Court of Appeals for the First Ciruit agreed. The evidence herein was admissible, did not conflict with the award and, in fact, fully justified it. Thus, the *SCM* case, *supra*, is not applicable.

B. *This Court Has Previously Held That It Would Not Review Factual Findings Affirmed by Two Lower Courts.*

This Court has held that it will not normally overturn factual determinations found by a trial court and upheld by a court of appeals. In *Comstock* v. *Group of Investors*, 335 U.S. 211 (1947), this Court stated at p. 214:

> A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error.

In the present action, there has been no showing of error whatsoever, let alone an exceptional showing. Therefore, the opinion of the court of appeals should not be reviewed. *Neil* v. *Biggers*, 409 U.S. 188 (1972) at p. 193, n.3, 202, 203.

Conclusion

For the foregoing reasons, the Petition for certiorari should be denied.

Respectfully submitted,

JAY EDWARDS, INC.
By its Attorneys,
DANIEL A. LAUFER
MYERS AND LAUFER
4 Park Street
Concord, NH 03301
(603) 228-1151

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

Civil Action No. 78-49-D

JAY EDWARDS, INC.,
PLAINTIFF

v.

NEW ENGLAND TOYOTA DISTRIBUTOR, INC., ET AL.,
DEFENDANTS

MOTION FOR NEW TRIAL

The defendant New England Toyota Distributor, Inc. hereby requests—pursuant to the provisions of Federal Rules of Civil Procedure, Rule 59—that the judgment entered in this proceeding on April 22, 1982 be set aside and that a new trial be granted for the reasons set forth below.

1.) The jury was not warranted in finding that the defendant New England Toyota Distributor, Inc. (hereinafter, "NET") proximately caused the plaintiff's damages subsequent to a date on or about June 8, 1978, since a new distributor had succeeded NET; the new distributor had had sufficient time in which to re-determine the plaintiff's "travel rate;" and the new distributor failed and/or refused to alter plaintiff's allegedly arbitrary allocations. Accordingly, any damages incurred by the plaintiff on or after the above date were proximately caused by the new distributor and are not attributable to the actions of NET.

2.) The court erroneously excluded documentary evidence of sales during the years 1976 and 1977 made by the plaintiff and by the alleged competing dealer Bill Dube, Inc. on the principal ground that the documents in question had not been

disclosed by the defendant during discovery. See Defendants' Exhibits GGGG and HHHH for identification. Since the evidence clearly established that sales were the most significant factor in determining allocations, and since the excluded documents indicated that the sales comparisons favored Bill Dube, Inc., the defendant was deprived of an opportunity to present persuasive evidence that the more generous allocations awarded to Bill Dube, Inc. were justified.

3.) The court erroneously excluded testimony by the witness Benson M. DeWitt regarding a telephone conversation with one Joseph DeHart, in which the said DeHart desribed a meeting attended by the New Hampshire Attorney General. The out-of-court statements of DeHart were offered not for the truth of their contents, but for the purpose of showing certain information regarding the concluding of the Attorney General's investigation of the plaintiff which had been given to NET. Such evidence would have warranted a finding that NET's reference to the subject matter of the investigation in the termination letter of June 15, 1977 was not made in bad faith, and the defendant was materially prejudiced by its exclusion.

4.) The Court erroneously admitted irrelevant and highly prejudicial documentary evidence which contained references to the criminal conviction of a brother of George A. Butler, the principal shareholder and chief executive officer of the defendant NET.

5.) The Court erroneously admitted certain documentary exhibits—including, but not limited to, a so-called "Image Survey" of the plaintiff (Plaintiff's Exhibit 372) and certain correspondence from non-parties—on the ground that they were governed by the "business records" exception to the hearsay rule without making the findings required by Federal Rules of Evidence, Rule 803(6), and the defendant NET was materially prejudiced thereby.

The defendant New England Toyota Distributor, Inc. will file a memorandum in support of this motion within ten days after the filing of a written objection by the plaintiff in accordance with Local Rule 11(b)(2).

WHEREFORE, the defendant New England Toyota Distributor, Inc. respectfully requests the following:

1.) That this Court set aside the judgment entered on April 22, 1982 and grant a new trial upon Count V of the complaint.

2.) That, in the alternative (and without waiver by the defendant of its prayer set forth in item # 1), this Court set aside the judgment entered on April 22, 1982 and grant a new trial upon Count V of the complaint, with such new trial to be limited to the subject of damages.

3.) That, in the alternative (and without waiver by the defendant of its prayer set forth in item # 1), this Court set aside the judgment entered on April 22, 1982; set aside that portion of the jury verdict which represents damages incurred by the plaintiff subsequent to June 8, 1978; and enter judgment for the plaintiff in the remaining amount.

4.) That this Court grant whatever additional or alternative relief it considers appropriate under the circumstances.

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.

By its attorney:

WILLIAM I. COWIN
JOEL KOZOL
FRIEDMAN & ATHERTON
28 State Street
Boston, MA 02109
Tel: (617) 227-5540

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Civil Action No. 78-49-D

JAY EDWARDS, INC.,
PLAINTIFF

v.

NEW ENGLAND TOYOTA DISTRIBUTOR, INC., ET AL.,
DEFENDANTS

DEFENDANT'S NOTICE OF APPEAL

Notice is hereby given that New England Toyota Distributor, Inc., a defendant in the above-entitled action, hereby appeals to the United States Court of Appeals for the First Circuit from the final judgment entered in this action on the twenty-second day of April, 1982 (plaintiff's motion to amend the judgment having been acted upon by the trial judge on the second day of June, 1982).

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.

By its attorney:

WILLIAM I. COWIN
FRIEDMAN & ATHERTON
28 State Street
Boston, MA 02109
Tel: (617) 227-5540

No. 83-248

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.,

Petitioner,

—v.—

JAY EDWARDS, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

Steven Glickstein
Mark Platt

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 407-8000

Of Counsel

ALLEN KEZSBOM
425 Park Avenue
New York, New York 10022
(212) 407-8000

*Attorney for Petitioner
New England Toyota
Distributor, Inc.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-248

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.,

Petitioner,

—v.—

JAY EDWARDS, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

NET respectfully submits this reply brief in support of its petition for a writ of certiorari.

NET'S NEW-TRIAL MOTION WAS TIMELY

Edwards, in its responding brief, invents an erroneous procedural issue to divert the Court's attention from the question presented in NET's petition. It argues—incorrectly, and for the first time in this Court—that NET's motion for a new trial on damages was untimely.[1] By making this spurious procedural

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1 This novel argument should have been raised in the court of appeals. NET had expressly appealed *both* from the final judgment of the district court *and* from the denial of NET's motion for a new trial, and any question as to the timeliness of the new-trial motion should have been addressed in that appeal.

argument the centerpiece of its brief, Edwards underscores the weakness of its position on the merits.

Edwards is dead wrong when it asserts that NET's new-trial motion "did not raise the issue of . . . damages awarded for the period prior to March 8, 1978." (Respondent's Br. at 5) NET's motion expressly sought a new trial on the issue of damages for the *entire* period claimed by Edwards—*not* just for the period after NET ceased to be Edwards' distributor, as Edwards asserts. Thus, NET's motion explicitly stated:

> "WHEREFORE, the defendant New England Toyota Distributor, Inc. respectfully requests the following:
>
> • • •
>
> 2.) That, in the alternative (and without waiver by the defendant of its prayer set forth in item #1), this Court set aside the judgment entered on April 22, 1982 and grant a new trial upon Count V of the complaint, with such new trial to be limited to the subject of damages." (Respondent's Br. at 12)

There is no dispute that this motion was filed on April 29, 1982, well within the 10 days required by Fed. R. Civ. P. 59(b).[2] NET's new-trial motion was unquestionably filed on time.

As Edwards acknowledges, the factual and legal grounds supporting NET's motion were amplified in NET's supporting memorandum. (Respondent's Br. at 5)[3] That memorandum was also timely filed pursuant to Local Rule 11(b) (2) of the District of New Hampshire, which provides:

> **Filing of Affidavits, etc.** Within ten days after the filing of a written objection, the party having the burden of going forward on the motion shall file all affidavits or other documents setting forth any necessary facts and, if

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2 The judgment was entered on April 22, 1982.

3 The memorandum is reproduced in the appendix.

desired, a memorandum in support of his position, including citation of supporting authorities.

NET's memorandum—which devoted more than 11 pages to explaining the errors in Edwards' damage theory—was filed on May 13, 1982, within the prescribed 10-day period.[4] That being so, the memorandum was among the papers the district judge was required to consider, and it set forth arguments the district judge was required to weigh in deciding the motion.

There is no question, moreover, but that the district court did consider NET's memorandum (and the speculative-damages arguments it presented) to be properly before the court. In denying the motion, the district court stated that "[t]he Court has read and considered said motion together with Defendants' evidentiary material and *memorandum of Points and Authorities in support thereof.*" (Petition App. at 23a; emphasis added) It is therefore indisputable that the district court, in accordance with its local rules, considered NET's memorandum as an integral part of the timely new-trial motion, and properly considered the speculative-damages arguments raised in that memorandum.

THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS

Edwards further attempts to sidestep the question presented by suggesting that NET has misread the court of appeals' opinion. However, Edwards' own attempts to reframe the question demonstrate convincingly that NET's reading is correct. According to Edwards, the court of appeals held that since NET failed to "object to Edwards' exhibits and testimony at trial" and since it had the opportunity to present witnesses and to cross examine, "it [NET] cannot now be heard to claim there is insufficient evidence to support an adverse

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4 Edwards filed its written objection to NET's new-trial motion on May 3, 1982.

result." (Respondent's Br. at 4-5) This is precisely the error in the court of appeals' opinion, however. By confusing the concepts of admissibility and weight, the court below allowed a damage award to stand which even it conceded "reflects annual profits proportionately *far greater* than Edwards ever made . . . ." (Petition App. at 5a; emphasis added)

Edwards' attempt to obfuscate the irreconcilability of the holding in *Springfield Crusher, Inc.* v. *Transcontinental Ins. Co.*, 372 F.2d 125 (3d Cir. 1967), with the holding below, by suggesting that the two cases "involve different factual circumstances", is unavailing. (Respondent's Br. at 7) There can be no question that under the newly announced First Circuit rule, the result in *Springfield* would have been different.

In *Springfield*, the Third Circuit ordered a new trial on damages because the jury verdict "was not reconcilable with the evidence." 372 F.2d at 126. It did so despite the fact that the jury properly had before it certain *unobjected-to* evidence which had been introduced by the plaintiff to support the award. *Id.* at 127. Under the First Circuit's new rule, the fact that the evidence was not objected to would terminate any further inquiry regarding the weight of the evidence and the verdict would have been upheld. The Third Circuit recognized, however, that the absence of an objection went only to the question of whether the evidence was properly admitted, and did not preclude a finding that the evidence was nonetheless of insufficient weight.

Edwards is equally off base in its attempt to distinguish *SCM Corp.* v. *Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981), *aff'g* 463 F. Supp. 983 (D. Conn. 1978), *cert. denied*, 455 U.S. 1016 (1982). Edwards blithely states that *SCM* is "not applicable" and that it provides nothing more than an "inept analogy" to the instant case. (Respondent's Br. at 8) These conclusory arguments cannot alter the fact that the *SCM* court reversed the jury award in favor of SCM, even though the damages had been based on evidence *introduced* by Xerox. Under the First Circuit's rule, the fact that Xerox introduced the damage exhibit would have precluded a later challenge by Xerox to the

legal sufficiency of the evidence. But, as Edwards itself acknowledges, the Second Circuit nonetheless rejected the verdict because it was "impossible in view of the uncontroverted testimony on sales." (Respondent's Br. at 8)

The damages claimed by Edwards in this case were equally impossible in view of the controverting figures contained in the *damage exhibit itself*, which showed that Edwards never even came close in real life to achieving the level of profitability it claimed in its damage theory. (*See* Petition at 7-8) Moreover, despite what Edwards contends, the court of appeals did not fail to appreciate the utter lack of integrity of Edwards' damage evidence. (*See* Petition at 4-6) As was pointed out above, the court of appeals stated that "[t]he [damage] award reflects annual profits proportionately *far greater* than Edwards ever made . . ." and added that "[w]ere we to write on a clean slate, we might find merit to NET's contentions," meaning that it would have reversed the award if an objection to the evidence had been made. (Petition App. at 5a; emphasis added)

The Second and Third Circuits have held that an objection at trial is not a precondition to the overturning of a speculative damage award. The First Circuit has held that a speculative damage award can stand if no objection to the damage evidence was made. It is hard to imagine a clearer conflict among the circuits.

THE DECISION BELOW WILL RESULT IN A WASTE OF JUDICIAL RESOURCES

Edwards would have the Court believe that the decision in this case will affect no one other than the parties to this litigation. However, as we pointed out in our petition, the court of appeals' erroneous decision will have far reaching consequences. (Petition at 13) The First Circuit's new legal standard, which requires lawyers to object to evidence in order to challenge its weight on a new-trial motion, will inevitably

result in a great proliferation of frivolous objections at trial by attorneys who will be fearful of waiving their clients' rights to a new trial by failing to object. The resulting disruption of trial and wasteful expenditure of precious court time will only contribute to what has steadily emerged as a national crisis. In a time when all steps must be taken to streamline costly and time-consuming litigation, it cannot be seriously argued that a holding that is likely to encourage the waste of judicial resources is of concern only to the parties.

CONCLUSION

For the reasons stated, a petition for a writ of certiorari should be issued to the United States Court of Appeals for the First Circuit.

Dated: October 5, 1983

Respectfully submitted,

Steven Glickstein
Mark Platt
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 407-8000

ALLEN KEZSBOM
425 Park Avenue
New York, New York 10022
(212) 407-8000
Attorney for Petitioner New England Toyota Distributor, Inc.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 78-49-D

JAY EDWARDS, INC.,

Plaintiff,

—v.—

NEW ENGLAND TOYOTA DISTRIBUTOR, INC., et al.,

Defendants.

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT N.O.V. OR FOR A NEW TRIAL

Defendant New England Toyota Distributor, Inc. ("NET") submits this memorandum in support of its motion for judgment n.o.v. or, in the alternative, for a new trial or a remittitur.

PRELIMINARY STATEMENT

The $1.4 million verdict against NET in this case represents a manifest miscarriage of justice, totally out of proportion to any alleged wrongdoing by NET or any conceivable injury sustained by the plaintiff, Jay Edwards, Inc. ("Edwards").

There was absolutely no evidence to sustain the major portion of the jury's damage award, namely, a purported misallocation of cars at a time when NET was not the distributor supplying cars to the plaintiff. In fact, there was no proof

whatsoever that the plaintiff received even one less car than it was supposed to after March 8, 1978, the date NET ceased to be distributor, or even one less car than the allegedly favored dealer. Edwards' damage theory was predicated on an assumption wholly without support. More than $900,000 of the $1.4 million verdict is attributable to this rank speculation. *See* Point I below.

In fact, the entire damage award—both for the period of NET's operation of the distributorship and thereafter—is fatally infected by gross mathematical errors, faulty logic and still other unsupported assumptions. One simple logical fallacy, for example, had the effect of doubling plaintiff's damages—a $700,000 mistake—because Edwards calculated damages based on reallocating to himself *all* of the cars at issue instead of reallocating them fifty:fifty with the favored dealer, who would have been entitled to his share equally along with Edwards. The jury's verdict on the issue of damages is plainly premised on impermissible speculation and guesswork, and must therefore be reversed. *See* Point I below.

Furthermore, Edwards has failed to demonstrate that NET was the proximate cause of any injury during the time when TMD was Edwards' distributor. *See* Point II below.

In addition, the Court made numerous errors in its evidentiary rulings. The most significant of these rulings: (1) improperly excluded evidence from trial which proved that NET did not tamper with plaintiff's allocation; (2) erroneously admitted hearsay evidence concerning a conversation that plaintiff purportedly had with an unidentified TMD employee; and (3) prejudicially admitted highly inflammatory evidence concerning the warranty fraud conviction of Gordon Butler, brother of NET chairman George Butler, which evidence had absolutely no relevance to any issue in this case, and which could only have prejudiced the jury against the defendant. *See* Point III below.

Finally, evidence which was excluded by this Court at trial, as well as newly discovered mathematical evidence, conclusively demonstrates that plaintiff was allocated vehicles strictly on the basis of the same mathematical formula applicable to all

dealers, and that there was no deviation. This evidence unequivocally proves that plaintiff was not shorted even a single car, and that NET meticulously complied with its obligation to deal with the plaintiff in good faith. *See* Point IV below.

FACTS AND PRIOR PROCEEDINGS

Plaintiff Jay Edwards, Inc. ("Edwards") is a Toyota dealer in Portsmouth, New Hampshire. Defendant NET was the distributor of Toyota vehicles to New England dealers (including Edwards) until March 8, 1978, when NET's distributorship was terminated by the national importer, Toyota Motor Sales, U.S.A., Inc. ("TMS"). TMS replaced NET with TMS' own subsidiary, Toyota Motor Distributors ("TMD"). It is undisputed that TMD, and not NET, was solely responsible for supplying Edwards with cars after March 8, 1978.

In this action, Edwards claims that NET gave preference to a nearby Toyota dealer in the allocation of vehicles. Edwards alleges that the nearby dealer, Bill Dube, Inc. ("Dube"), wrongfully received more cars than Edwards. Edwards claimed that NET improperly allotted more cars to Dube in retaliation for Edwards' activities, in violation of the good faith provisions of New Hampshire RSA ch. 357-C. NET, on the other hand, insisted that Edwards received the precise number of vehicles to which it was entitled, according to a mathematical formula applicable to all dealers, and that Edwards' lower allocation was attributable to Dube's superior performance. Edwards predicated his damage theory on the hypothesis that, but for NET's allegedly unlawful acts, Edwards would have received the same number of cars as Dube.

After trial, the jury awarded Edwards $1,419,462, the precise amount demanded by the plaintiff in its damage theory. Of this amount, $470,024 in alleged damages was attributable to the time period prior to March 8, 1978 when NET was distributor. The remainder, or $949,438, was attributable to the period from March 8, 1978 until March 31, 1981, when TMD was Edwards' exclusive distributor. At trial, the Court admitted, over NET's objection, "evidence" relating to the post-

NET period. At the close of plaintiff's case, NET moved to strike all testimony and exhibits relating to damages allegedly incurred subsequent to March 8, 1978. The motion was denied.

Judgment was entered on the jury's verdict on April 22, 1982, and NET filed a timely post-trial motion to set aside the jury's verdicts.

POINT I

PLAINTIFF'S ENTIRE DAMAGE THEORY IS BASED UPON RAMPANT SPECULATION AND GUESSWORK WHICH IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE JURY'S VERDICT

It is black letter law that plaintiff must "prove lost profits with reasonable or fair certainty." *Cecil Corley Motor Company, Inc.* v. *General Motors Corp.*, 380 F. Supp. 819, 854 (M.D. Tenn. 1974); *Siegfried* v. *Kansas City Star Co.*, 298 F.2d 1 (8th Cir. 1962), *cert. denied*, 369 U.S. 819 (1962); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963). Such proof must be "sufficient to bring the issue outside the realm of conjecture, speculation or opinion unfounded on definite facts," *Cargill, Inc.* v. *Taylor Towing Service, Inc.*, 642 F.2d 239 (8th Cir. 1981); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1945); *Cordeco Development Corp.* v. *Santiago Vasquez*, 539 F.2d 256 (1st Cir. 1976), *cert. denied*, 429 U.S. 978 (1976); *Robie* v. *Ofgant*, 306 F.2d 656 (1st Cir. 1962); and must provide a "rational basis," *Herman Schwabe Inc.* v. *United Shoe Machinery Corp.*, 297 F.2d 906, 910 (2d Cir. 1962), *cert. denied*, 369 U.S. 865 (1962), from which a "just and reasonable inference and estimate [of the damages] can reasonably be drawn." *National Wrestling Alliance* v. *Myers*, 325 F.2d 768, 777 (8th Cir. 1963); *Cargill, Inc.* v. *Taylor Towing Service, Inc., supra*; *Christiansen* v. *Mechanical Contractors Bid Depository*, 230 F. Supp. 186 (D. Utah 1964), *aff'd*, 352 F.2d 817 (10th Cir. 1965), *cert. denied*, 384 U.S. 918 (1966). This is because "the purpose of a damage award is to compensate the

injured party for loss resulting from the conduct of the wrongdoer, 'not to penalize the wrongdoer or to allow plaintiff to recover a windfall.' " *Cordeco Development Corp.* v. *Santiago*, 539 F.2d at 262; *Robie* v. *Ofgant*, 306 F.2d at 660; *Burke* v. *Burnham*, 84 A.2d 918 (N.H. 1951). Thus, courts have established these strict requirements in order to prevent plaintiffs from recovering amounts in excess of their real damages, predicated on irrational and illogical arguments and computations.

Thus, for example, in *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d at 391, the court rejected a plaintiff's attempt to measure his damages in one product line by reference to his performance in another product line absent a showing that performance in one product was actually indicative of performance in the other. The *assumption*, which plaintiff relied on, that the two products moved in tandem, could not be the basis for a damage award without proof that the assumption had validity. Similarly, in *David R. McGeorge Car Co.* v. *Leyland Motor Sales, Inc.*, 504 F.2d 52, 59 (4th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975), the court set aside a damage award in an automobile misallocation case where the plaintiff's damage theory awarded the plaintiff *all* of the allegedly misallocated cars. The Fourth Circuit recognized that plaintiff's theory proceeded upon a logical fallacy in that plaintiff had excluded both (1) his real world allocation from the total and (2) failed to recognize that three other dealers involved were entitled to their proportionate share of the vehicles received in total by all four.

In short, in case after case, the courts have recognized that a plaintiff may not recover damages unless his theory of recovery makes logical sense, is a valid measurement of the impact of the injury claimed, and relies on assumptions which are borne out by the evidence. Here, plaintiff's theory cannot meet this test.

A. There Is No Evidence To Support Plaintiff's Assumption That Dube Was Offered More Cars Than Edwards After March 8, 1978

Edwards' theory in this case was that NET discriminated in its allocation of cars against Edwards and in favor of Dube. The theory hypothesizes that but for NET's alleged misallocations, Edwards would have received the exact same number of cars as Dube. The evidence revealed that NET offered Dube 214 more cars than Edwards in 1976, so that Edwards' damage analysis presumed that it should have been offered 214 more cars. Similarly, the evidence revealed that NET offered Dube 313 more cars than Edwards in 1977, so that Edwards' damage analysis presumed that it should have been allocated 313 more cars. This provided the analysis for 1976 and 1977, when NET was the distributor.

As to the subsequent period, *i.e.*, after March 8, 1978, there was absolutely *no* evidence relating to Dube's allocation of cars. And that means that there is nothing whatever in the record to show that Edwards was allocated fewer cars than Dube subsequent to March 8, 1978. For all we know, TMD offered Edwards an equal number or even more cars than Dube. *It is simply impossible to award damages based upon Edwards' alleged shortage of cars relative to Dube, when there is not a scintilla of evidence that after NET ceased being distributor, Edwards' allocation was in fact lower than Dube's.*

Nothing prevented Edwards from introducing evidence as to what Dube was allocated by TMD.* He did not do so, however. Instead, Edwards pulled a mathematical sleight of hand which obviously fooled the jury. Instead of presenting evidence that Edwards was in fact allocated fewer cars than Dube, Edwards' accountant simply *presumed*—without any proof—that TMD offered 300 fewers cars to Edwards in 1978,

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* Both TMD and Dube were within the subpoena power of the court and Dube, in fact, was a trial witness.

1979, 1980 and 1981 than TMD offered to Dube.* What is the basis for this assumption that TMD allocated Dube 300 more cars a year than Edwards? The only "basis" proffered is that NET, on average, allocated 300 more cars a year to Dube than to Edwards prior to the time TMD became distributor. This so-called "basis" does no more than restate the assumption that TMD allocated to Dube and Edwards in the same proportion as NET. It does not constitute evidence that TMD, in fact, allocated more cars to Dube than to Edwards.

The courts have repeatedly rejected damage theories which, like in Edwards', make unsupported assumptions about one time period based on performance or activities in another or about one line of business based on another. In *William Inglis & Sons Baking Co.* v. *ITT Continental Bakery Co.*, 461 F. Supp. 410 (N.D. Cal. 1978), *aff'd in part and rev'd in part*, 652 F.2d 917 (9th Cir. 1981), the court struck down a damage claim that relied on "profit experience" between 1960 and 1964 as a "base period for projecting lost profits" in later years. The court explained that the analysis was invalid for the "comparability of the base and later period had not been established."

The 9th Circuit made the same point in *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke and Liquors, Ltd.*, when it rejected an attempt to extrapolate the plaintiff's performance in one business as a basis for computing damages in a different business in which the plaintiff was also engaged. The Appeals Court cautioned against the use of " 'an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it.' " (416 F.2d at 87, quoting *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F.2d 906, 912 (2d Cir. 1962).

Here, there was not a scintilla of evidence that Dube received more cars from TMD than did Edwards, which is the fundamental premise of Edwards' damage claim. Certainly, Edwards

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* The 300 figure is an annual figure. The actual number used for 1981 was 75, which represents a quarter-year's total and reflects the fact that damages were only claimed through March 31, 1981.

would not have sustained any injury and could not recover any damages for the time TMD was distributor if, subsequent to March 8, 1978, Edwards in reality was offered *more* cars than Dube. Since plaintiff introduced no evidence proving that it received less than Dube after March 8, 1978, its claim that it was entitled to 300 more cars a year is pure speculation without any foundation in the record. The Court must, therefore, grant judgment n.o.v. with respect to the $949,438 in damages awarded by the jury for that time period.

B. There Is A Logical Fallacy In Edwards' Assumption That It Would Receive A Constant Number Of Additional Cars In The Face Of A Sales Decline

Not only did Edwards fail to support his assumption that he received fewer cars from TMD (NET's successor as distributor) than Dube, but he also failed to justify his further assumption that the discrimination was properly measured as a constant 300 cars per year for each of the years 1978, 1979, 1980 and 1981.

According to Edwards' own records introduced at trial, Edwards' real world sales actually declined from 382 in 1977 (NET's last year) to 357 in 1978 (TMD's first year) to 310 vehicles in 1979 (TMD's second year)—despite an increased supply of Toyotas to the New England area as a whole. If TMD adopted the same formula as NET, one would expect Edwards to receive the same overall percentage of vehicles in 1978 and 1979 as he did in 1977, which would mean an *increase* rather than a decline in sales. The fact that Edwards' sales declined in absolute numbers can only mean one of two things. Either TMD allocated to Edwards on a *lower* percentage basis than did NET (in which case NET could not possibly be responsible) or Edwards' sales performance simply decreased (in which case the decline is attributable to Edwards and not NET). In no event does Edwards explain why he is entitled to the same 300 extra cars in 1978, when he sold 382 cars in actuality, as in 1980, when he was able to sell only 310. Since a dealer's allocation is supposed to reflect his sales performance, Edwards' damage theory is invalid since it plainly fails to do so.

In *Cordeco Development Corp.* v. *Santiago Vasquez*, 539 F.2d at 262, the court recognized that there must be a "clear basis for *calculating the extent*" (emphasis added) of the impact of the alleged unlawful conduct. Here, Edwards has provided no basis for the conclusion that the alleged misallocation amounted to the same 300 cars a year in each of the years 1978-1981, particularly in the face of evidence from Edwards' own records that his sales performance over the period was in decline.

C. *Edwards' Damage Theory Is Irrational And Contains An Impermissible Double-Count*

There is still a further logical fallacy in Edwards' damage theory, and this fallacy exists with respect to Edwards' damage claim covering the period when NET *was* the distributor as well as the subsequent period.

Edwards' accountant has made a fundamental error in logic which has had the effect of doubling Edwards' damages—a $709,731 mistake.* Edwards' damage theory assumes that, beginning in April 1976, Edwards and Dube should have been offered an identical number of cars. In April 1976, for example, Dube was allocated 70 cars while Edwards was allocated 28. Edwards' damage theory presumes that it should have been offered 70 cars just like Dube, and computes damages based on that premise.

The fundamental error in Edwards' computation can be illustrated in the following chart.

	Allocation	*Assumed Allocation Under Edwards' Damage Theory*	*Correct Computation*
Dube	70	70	49
Edwards	28	70	49
TOTAL	98	140	98

* Of the total $709,731 error, $235,012 is attributable to the period before March 8, 1978 and $474,719 is attributable to the subsequent period.

As can be seem from the above chart, NET had a total of 98 cars to allocate as between Edwards and Dube. If the 98 cars were divided equally between the two, each would receive a total of 49 cars. Edwards' total would increase by 21 cars and Dube's total would be reduced by 21 cars, leaving the same 98 cars with which we started. Edwards' damage calculation, however, creates an additional 42 cars out of thin air. This is accomplished by raising Edwards' total by 42 without reducing Dube's allocation by a single car. The result is that damages are predicated on the basis of 140 vehicles when in fact only 98 vehicles existed. Obviously, if Dube's and Edwards' allocations are to be equalized, it must be done on the basis of the 98 cars which existed in the real world, and not on the basis of the 42 extra fictitious cars.

The practical effect of this error is to exactly double plaintiff's alleged damages. In our example, for instance, Edwards computed damages on the basis of 42 extra cars being made available to him. In fact, if Dube and Edwards were equalized in the real world, Edwards would have had only 21 (half of 42) additional vehicles.

This is precisely the logical fallacy which caused the court to throw out the damage theory in *David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F.2d 52 (4th Cir. 1974). There, the plaintiff dealer, alleging misallocations in the supply of Triumphs, claimed he was "shorted" 52 cars in 1970. Plaintiff's expert introduced into evidence a damage theory which developed the 52 car projection by (1) asserting that McGeorge's 1967-1968 sales amounted to 87 percent of the combined total of cars sold by the three allegedly favored dealers; (2) applying this percentage to the units supplied to the three favored dealers in 1970; and (3) subtracting the 31 cars McGeorge actually received in 1970 from that total. On appeal, the 4th Circuit recognized that plaintiff's theory did not measure the "misallocation". This could only be done by determining the plaintiff's percentage of the aggregate of the cars received by all four dealers and dividing that aggregate among them, after which plaintiff's actual "shortage" was only 28 cars. So, too, here, by simply taking for himself the

total difference between his and Dube's allocation, Edwards has not measured the misallocation but is becoming the improperly favored dealer himself.

D. Edwards' Damage Theory Conflicts With Edwards' Performance In The Real World And Is Therefore Irrational

Edwards' damage theory conflicts with Edwards' actual profit performance in the real world and therefore is without a rational basis. The following chart illustrates the glaring error in Edwards' damage calculation:

	Number of Cars	*Net Profit*
1976 Actual	183	$ 28,242
1977 Actual	382	$ 86,912
1976 Projected	354	$203,867

In 1976, Edwards received 183 cars during the nine-month damage-period and earned a net profit of $28,242, according to the damage exhibit. Under plaintiff's theory, Edwards should have received 354 cars; and Edwards projects a profit of $203,867 on those 354 cars. In the real world, Edwards did receive 382 cars in 1977 or 28 more cars than the 1976 projection. Far from making a $203,000 profit, however, Edwards' real world profit was at most $86,000 (according to Edwards' financial statements), and probably only $35,000 (according to Edwards' tax return). There is no basis for a jury awarding damages to Edwards on the presumption that Edwards could have earned $203,000 on 354 cars when in the real world Edwards earned only $86,000 (or $35,000 per his tax return) on 382 cars in 1977.

Edwards' real life profits in 1978 ($56,385 on 357 cars) and 1979 (only $2,583 on 310 cars) further prove the ridiculousness of Edwards' profit assumptions.*

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* The real life profit totals according to Edwards' tax returns are even lower. They show a $39,687 profit on 357 cars in 1978 and a $1,492 loss on 310 cars in 1979.

The reason why Edwards' damage theory is so plainly belied by his real world experience is that Edwards' damage theory fails to account for increasing variable expenses and erroneously assumes that revenue from parts, service and used car sales goes up in direct proportion to increases in new car sales. In fact, Edwards' own financial statements show that parts, service and used car sales do *not* increase in such a manner and that variable expenses increase more than Edwards' accountant presumed in the damage theory.

Similarly, in deriving his gross profit amount per unit of new car, Edwards failed to take account of the fact that the total number of cars available for allocation includes less desirable cars along with more desirable ones. Less desirable cars, by definition, produce less profit, take longer to sell, and produce higher carrying costs. In the real world, Edwards turned down the less desirable cars, which is reflected in a higher gross profit per unit. If his allocation of vehicles were to increase materially in accordance with his damage theory, (*e.g.*, from 382 to 649), he would necessarily have a much higher number of undesirable cars and a lower unit gross profit. It is irrational to blithely assume, as Edwards does, that the same per unit gross profit would hold for the undesirable cars as he claims he achieved in the real world on the more desirable cars.

The facts in this case are strikingly similar to those in *Cecil Corley Motor Co., Inc.* v. *General Motors Corp.*, 380 F. Supp. 819 (M.D. Tenn. 1974), where the court granted a judgment n.o.v. to the defendant, General Motors, on a misallocation claim by a Pontiac dealer. The court criticized plaintiff's attempt to prove lost profits based on a variable net profit figure which did not account for additional expenses generated by increased sales volume. The court also noted that contrary to plaintiff's contention, such additional expenses would not be offset by increased profits generated by the parts and service departments. Furthermore, the court questioned plaintiff's "lost sales" estimates which were based on unsupported assumptions regarding the manner in which cars should have been allocated to plaintiff and its competitors. Also, the court found that there was "absolutely no proof that plaintiff or-

dered Pontiacs in quantities sufficient to justify distribution to it in the amounts suggested" by its witnesses, thus making it "impossible for plaintiff to have been damaged in the amounts suggested by those witnesses." (*Id.* at 858). The Court's conclusion that the plaintiff's damage theory amounted to "wild, unsupported and unfounded speculation" (*Id.* at 858) is equally applicable here.

* * *

There can be no serious dispute here that plaintiff's elaborate damage calculations serve only to mask the flimsy factual basis on which those calculations rest. As we have shown, Edwards' damage calculation is fraught with unsupported factual premises, baseless assumptions, and faulty logic, each of which, standing alone, would warrant overturning the jury's verdict. This is true for the period while NET was still distributor and for the period when TMD was distributor.

The fact that the jury accepted this irrational and erroneous theory in full, without even a dollar's discount, demonstrates the wisdom of the admonition in *Schwabe* and *Seagram* that the courts must guard against "an array of figures conveying a delusive impression of exactness in an area where the jury's common sense is less available than usual to protect it."

E. Edwards Failed To Meet Its Obligation To Present The Best Available Evidence On Damages

Plaintiff has also failed to prove its claim with the best available evidence. Actual statistics were available to the plaintiff regarding the number of cars Dube was allocated in 1978 and beyond. Edwards' counsel had ample opportunity to take discovery of TMD but did not do so. Moreover, TMD is located in Mansfield, Massachusetts, within the subpoena power of the Court (being less than 100 miles from Concord), so that the actual comparison of Dube's and Edwards' allocations subsequent to March 8, 1978 could have been obtained. And, of course, Dube was called as a witness but evidence of his allocations was not developed by plaintiff at trial or during discovery.

In *Cecil Corley Motor Co.* v. *General Motors Corp.*, *supra*, the court included among its reasons for granting a new trial the fact that "plaintiff had in its possession the means with which to calculate, with reasonable certainty, a net profit figure as to Pontiac automobiles, [yet] chose instead to go to the jury with less than the best available evidence on damages." 380 F. Supp. at 858-59. Similarly, in *Harrison* v. *Prather*, 435 F.2d 1168, 1174 (5th Cir. 1970), the court observed that Mississippi law "does hold that the most accurate and reliable evidence available should be required to prove anticipated profits." Similarly, in *Bitler* v. *Terri Lee, Inc.*, 81 N.W.2d 318, 329-330 (Neb. 1957), the court stated:

> ". . . The law requires the best evidence available. A claimant of substantial damages must, to prevail, furnish appropriate data to enable the trier of fact to find the amount of damages with reasonable certainty and exactness if the evidence of damages or the amount thereof are susceptible of definite proof. They may not be established by conjecture, speculation, or doubtful proof."

Accord, *Sylvania Electric Products* v. *Flanagan*, 352 F.2d 1005 (1st Cir. 1965), *cert. denied*, 404 U.S. 829 (1971); *Hargis* v. *Sample*, 306 S.W.2d 564 (Mo. 1957). Thus, plaintiff here should not be permitted to speculate as to lost profits when accurate factual evidence was available.

POINT II

THERE WAS INSUFFICIENT EVIDENCE TO WARRANT A JURY FINDING THAT NET PROXIMATELY CAUSED INJURY TO EDWARDS DURING THE TIME TMD WAS EDWARDS' DISTRIBUTOR

We argued in Point I above that plaintiff's damage theory is undermined by the fact that there is not a shred of evidence in the record that Dube received a single car more than Edwards during the period when TMD was the distributor. We also demonstrated that the lack of any evidence that Edwards received fewer cars during that period than his proper alloca-

tion called for, similarly rendered his damage theory speculative. Both of these facts also demonstrate why it cannot be concluded that NET's actions prior to March 8, 1978 caused injury to Edwards *after* NET ceased to be the distributor. There is no evidence that Edwards was injured at all during that period.

But even if it be assumed—erroneously—that Edwards received fewer cars than Dube during the post-March 1978 period and that it was entitled to receive more, that would hardly establish that it was NET's fault that it did not receive its proper allocation *from TMD*.

A. There Is Insufficient Evidence To Support Plaintiff's Assumption That TMD Adopted The Same Allocation System As NET, Or That TMD Based Its Allocations To Dube And Edwards Upon NET's Allocations To Those Dealers

A fundamental premise of Edwards' claim of injury subsequent to March 8, 1978 is that TMD adopted the same allocation system as NET, and that TMD based its allocations to Dube and Edwards on the basis of NET's allocations to those dealers. But once again, there is a failure of proof.

To be sure, Jay Edwards did attempt to satisfy this burden by testifying to a purported conversation he had with an unidentified TMD employee. The totality of Mr. Edwards' testimony on this issue, which took no more than five minutes of trial time, was that Edwards asked this unidentified TMD employee to change his allocation because of alleged irregularities during the NET period and that the unidentified employee refused, purportedly because a change would offend other dealers. This evidence cannot possibly support the jury's damage award.

Most fundamentally, the statement by the unidentified TMD employee takes Edwards nowhere, even if true. The employee merely stated that he would not give Edwards more cars because that would offend other dealers. The employee did *not* say that TMD used the same formula as NET, or that TMD's

allocation to Edwards was based on NET's allocation to Edwards, or that Edwards was getting fewer cars than he was entitled to. That was Edwards' speculation but it was not confirmed by the employee.

Moreover, Mr. Edwards' testimony concerning this alleged conversation is rank inadmissable hearsay.* What is more, the testimony was made in circumstances which were particularly unreliable. First, the declarant was not even identified. Second, the declarant had a motive to be less than candid with Mr. Edwards, since TMD itself was being accused of misallocating vehicles. (There would be a strong incentive to blame it all on NET, if for no other reason than to get Edwards off TMD's back.) Third, Edwards, as an interested party, has a clear incentive to stretch or distort whatever was told to him. Fourth, the declarant, whose name is known only to Mr. Edwards, is within the subpoena power of the Court—presuming he is still a TMD employee—and yet he was not called by Edwards as a witness. It is preposterous to predicate a $950,000 damage award (for the post-March 1978 period) on this single hearsay statement by an unidentified person made in circumstances which are inherently unreliable.

Furthermore, there is substantial evidence that TMD did not use the same allocation formula as NET. Edwards' sales actually declined from 382 in 1977 (NET's last year) to 357 in 1978 (TMD's first year) to 310 vehicles in 1979 (TMD's second year)—despite an increased supply of Toyotas to the New England area as a whole. If TMD adopted the same formula as NET, one would expect Edwards to have received the same overall percentage of vehicles in 1978 and 1979 as he did in 1977. As discussed in Point I, the fact that Edwards' sales declined in absolute numbers can only mean one of two things. Either TMD allocated to Edwards on a *lower* percentage basis than did NET (in which case NET could not possibly be responsible) or Edwards' sales performance simply decreased

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* That is, it is an out-of-court statement (by the unidentified employee) being offered to prove the truth of the matter asserted (that TMD did not deviate from NET's formula).

(in which case the decline is attributable to Edwards and not NET).

B. As A Matter Of Law, NET Cannot Be Responsible For TMD's Intentional Misallocations To Edwards

Mr. Edwards' testimony and the documentary evidence both make it crystal clear that TMD was well aware of Edwards' claim of misallocation during the NET period. Edwards' claim is that TMD, with full knowledge of this error, nonetheless continued to misallocate cars in favor of Dube and against Edwards. If there were evidence—and there is not—that Dube continued to receive more cars than Edwards after TMD took over *and* that TMD refused to alter NET's allocation system, that would spell an intentional tort by *TMD*. NET could not be legally responsible for TMD's intentional tort against Edwards.

Indeed, the New Hampshire statute pursuant to which this case was tried expressly bars a claim for misallocation if the misallocation is "due to a cause over which the manufacturer, distributor, or wholesaler, or any agent thereof, shall have no control." R.S.A. 357-B:4 (III)(a) (1979 Supp.). Here, NET inarguably did not have control over TMD and could not "control" the number of cars which Edwards received from TMD. The express terms of the statute bar any claim by Edwards for the period of TMD's distributorship.

Moreover, it is black letter law that even an intentional tortfeasor is not an "insurer of . . . those whom he has wronged." *Johnson* v. *Green, supra*, 477 F.2d at 101 (5th Cir. 1973). The plaintiff therefore has the burden of proving that the defendant's actions were a substantial factor in causing the plaintiff's damage during the later period. Restatement of Torts, Second, § 433B(1). And a defendant's conduct would not be a "substantial factor" in bringing about the harm if there is a subsequent superceding act.

That is precisely the situation here. The Toyota dealership agreement expressly provided that all prior agreements and vehicle orders were terminated upon a change of distributors.

And, when TMD took over from NET, TMD specifically cancelled each and every dealership agreement then in effect in New England and executed brand new agreements with every single dealer. In other words, there was a complete break with the past and no obligation to continue any policy or practice of NET. Since TMD was free to change the system, Edwards could not sustain any injury by reason of NET's alleged past misdeeds unless TMD independently decided to perpetuate the wrong.

Assuming arguendo that TMD did decide to misallocate vehicles to Edwards, that decision was totally beyond NET's control and had nothing whatever to do with NET. Since NET had no power to prevent the continued misallocation and TMD had the sole power to prevent it, it is self-evident that TMD was the only cause of Edwards' alleged injuries after March 8, 1978 and that NET was no factor at all, let alone a substantial contributing factor.

That NET had nothing to do with Edwards' alleged post-March 1978 injuries is graphically demonstrated by the fact that TMD was well aware of claims that NET had misallocated to Edwards and other dealers, and that TMD did in fact alter some dealers' allocations to compensate for the alleged shortages. Particularly in light of these facts, TMD's alleged refusal to change Edwards' allocation would, if true, constitute an intentional decision by TMD against Edwards and his interests and surely could not be laid on NET's doorstep.

The record evidence is that Edwards and the Toyota dealer alliance repeatedly advised the national Toyota organization that dealers believed NET was misallocating. And Toyota's internal memorandum which gave the reasons for terminating NET's distributorship (PX 330) specifically listed as a reason for termination alleged violations by NET of state and federal dealer protection laws and coercive conduct by NET against its dealers. In the face of this evidence, there is no basis to assume that TMD did not correct any inequities that did exist with regard to Edwards—unless TMD made a conscious decision to disfavor Edwards itself.

And there is no question that TMD did make changes from NET's allocations. Thus, a June 14, 1978 letter from TMD to Union Toyota in Providence, Rhode Island reports Union as having complained of having "received very small allotments . . ." "due to the distribution practices of the previous distributor" (*i.e.*, NET) and awards Union Toyota "a substantial Toyota allotment" based on a request for more cars "and to correct any inequities you may have faced under the previous distributor . . ." And the letter concludes by observing that TMD was prepared to take "necessary corrective actions."

Here, there is undisputed evidence that NET had no power to cause Edwards further injury, and that after March 8, 1978, Edwards' fate was exclusively in the hands of TMD, a third party beyond NET's control. Either there was never any maldistribution to Edwards during the TMD period, or TMD corrected it, as they did with others. If for some reason TMD chose instead to discriminate against Edwards, that was its own doing and not NET's. No reasonable jury could determine that NET was a substantial factor for maldistribution of cars when TMD, and not NET, was making the distribution and when the statute absolves NET. The issue should not have been submitted to the jury. Judgment n.o.v. is the appropriate remedy.

POINT III

NET WAS PREJUDICED BY SEVERAL ERRONEOUS RULINGS ON KEY ITEMS OF EVIDENCE

The Court rendered several crucial decisions concerning the admissibility of certain evidence which affected the outcome of this case. Three rulings, in particular, were of key significance. Each of these rulings went against NET and seriously prejudiced NET's ability to mount an effective defense.

A. The Court Improperly Excluded Evidence Relating To Sales By Dube And Edwards In January-March 1976

Edwards' theory of liability assumes that he was entitled to the same number of cars that NET allocated to Dube and that

NET's failure to provide Edwards with an equal number of cars constituted a breach of NET's good-faith obligations under New Hampshire RSA Chapter 357-C. Edwards does not calculate, however, the precise number of cars which he and Dube should have received under NET's formula each month during the period in suit. Rather, Edwards asked the jury to draw the *inference* that because Edwards and Dube received approximately the same number of cars in January, February and March 1976, Edwards should have continued to receive the same number of cars thereafter. Edwards' argument was that in the absence of any cogent reason advanced by NET to explain the differential, the jury could rationally infer that the difference was a result of intentional misconduct by NET, rather than the objective application of a mathematical formula.

In fact, the Court excluded evidence which would have provided the explanation for Dube's higher allocations. The Court refused to permit NET to introduce two exhibits which contradicted Edwards' claim that Edwards sold more cars than Dube in January, February and March 1976. As the excluded evidence demonstrates, Dube outsold Edwards during that three-month period by a significant margin.

The Court excluded this vital evidence on the ground that it had not been provided to Edwards' counsel during discovery. It is undisputed, however, that the evidence was not in NET's possession prior to trial and that therefore NET could not possibly have turned over the evidence during pretrial discovery. The documents were located by Mr. Benson DeWitt, a former NET employee, in his personal file just prior to testifying in this case. There is no possible basis for penalizing NET for not producing evidence which was not within its possession or control, which was not known to NET, and which NET was under no obligation to produce. Even if plaintiff's counsel could make a legitimate argument of unfair surprise, which it cannot, the proper remedy would have been to grant plaintiff a continuance to examine the new evidence, not to exclude highly probative evidence altogether.

The prejudice resulting to NET from this erroneous ruling is obvious. Plaintiff's counsel asked each of NET's key witnesses what possibly could explain the differential between Dube's and Edwards' allocation, based upon the evidence which plaintiff had presented concerning Dube's and Edwards' sales in January, February and March 1976. Based on the evidence which plaintiff had put on the record, they could not offer such an explanation. The witnesses were precluded, however, from considering the most relevant evidence which would have provided the very explanation which the jury was seeking. Once armed with the fact that Dube in fact sold more cars than Edwards during the preceding three months, it is hardly surprising that Dube received more cars than Edwards during the month of April. The fact that the difference in the allocation exceeds the differential in sales, is explained by the fact that Edwards and Dube had different inventory levels (another factor in the mathematical equation). *See* Point IV below. It is thus plain that NET did not tamper with the allocation formula and the jury was deprived of considering evidence which would have proved this fact. Plaintiff is hardly entitled to reap the windfall of a jury verdict of $1.4 million in the face of such compelling contrary evidence.

B. The Court Improperly Admitted Hearsay Evidence Of A Conversation Between Edwards And An Unidentified TMD Employee

The Court improperly admitted hearsay evidence of a conversation between Jay Edwards and an unidentified TMD employee to the effect that TMD would not change Edwards' allocation of vehicles because it might offend other dealers. We have previously discussed the erroneous nature of this decision and its prejudicial effect on NET and will not repeat these arguments here.

C. The Court Improperly Admitted Evidence Relating To Gordon Butler's Conviction For Warranty Fraud

The Court improperly admitted, over NET's objection, highly inflammatory evidence concerning the warranty fraud

conviction of Gordon Butler. This evidence had absolutely no probative significance to any issue in this case and was designed solely to prejudice the jury against NET's chairman George Butler, who is Gordon Butler's brother. The plaintiff obviously wanted the jury to believe that dishonesty ran in the Butler family and to find against NET on that basis.

The evidence concerning Gordon Butler's warranty fraud conviction was ostensibly offered to show NET's regular policies and practices when it terminated a dealer (*i.e.*, that NET gave terminated dealers specific reasons why that action was being taken). This was at most a tangential issue here since NET ultimately revoked its termination notice to Edwards and Edwards' damage claim was not based on that revoked termination notice. Plaintiff obviously sought to show that NET singled out Edwards for special treatment but it has not explained how NET's termination of Gordon Butler's dealership bears at all on this question. Since there were numerous other instances in the record where NET either terminated or suggested that it might terminate a dealer, the evidence concerning Gordon Butler was, at most, cumulative and unnecessary and, more probably, totally irrelevant. Considering that the termination had nothing to do with Edwards' damage claim for misallocation, it is obvious that the "probative value" of Gordon Butler's warranty fraud conviction "is substantially outweighed by the danger of unfair prejudice" to NET. *See* Fed.R.Evid. 403. A new trial must therefore be granted because of the strong possibility that the jury rendered a verdict based on guilt by association.

POINT IV

EVIDENCE EXCLUDED BY THE COURT AND NEWLY DISCOVERED MATHEMATICAL EVIDENCE CONCLUSIVELY DEMONSTRATE THAT EDWARDS RECEIVED HIS PROPER SHARE OF CARS FROM NET

As discussed above, the only sure way to determine whether Edwards received his proper allocation of cars would be to apply to Edwards' actual sales and inventory the mathematical

formula which NET used to allocate vehicles to all dealers. Because the actual sales and inventory figures were not introduced at trial, Edwards relied on the inference that he was shorted cars, rather than on strict mathematical proof which would have been conclusive. The inference which Edwards asked the jury to make was that there was tampering with the mathematical formula because of the fact that Dube and Edwards received approximately the same number of cars in January, February and March 1976 but Dube received more cars beginning in April 1976.

There is now available indisputable, mathematical proof that Edwards did in fact receive the precise number of cars which he was entitled to under the mathematical formula applicable to all dealers. The same evidence indicates Dube likewise received the precise number of cars he was entitled to under the allocation system. The differential between Edwards' and Dube's allocations are conclusively explained by the objective application of this mathematical formula to both of their dealerships. In short, Edwards in fact received what he was entitled to and there was no liability-creating act or omission by NET.

The mathematical evidence which has recently been discovered consists of two items. The first is the sales data uncovered by Mr. DeWitt in his personal file and which was improperly excluded by this court. The second is a computer printout covering all dealers in NET's distributorship region and showing during the crucial month of April 1976 each dealer's sales, inventory levels, and day's supply of vehicles at the time of allocation. As is explained in the accompanying affidavit of Mr. DeWitt, NET allocated Messrs. Dube and Edwards the exact number of cars they were entitled to according to the strict application of the mathematical formula and that NET did not deviate from that equation one iota.

There is ample authority for granting a new trial based upon newly discovered evidence where such a trial is necessary to prevent a manifest injustice. *Ferrell* v. *Trailmobile, Inc.*, 223 F.2d 697 (5th Cir. 1955), is a prime example. In that case the plaintiff alleged that the defendant had failed to pay for goods

sold and delivered. At trial there was no documentary evidence concerning payment and the jury verdict was based upon conflicting testimony. After trial, the defendant obtained copies of the endorsed money-orders demonstrating that payment had been made. The Fifth Circuit held that a new trial was necessary to avoid a manifest injustice, notwithstanding the fact that the evidence could conceivably have been developed earlier and offered at trial:

> "If, in fact, practically conclusive evidence shows that the appellant had actually paid all eighteen installments for the purchase of the trailer, it is obvious that the judgment should be set aside to prevent a manifest miscarriage of justice. In such a case, the ends of justice may require granting a new trial even though proper diligence was not used to secure such evidence for the use at trial." *Id.* at 698.

As in *Ferrell*, here too there is now conclusive documentary proof that Edwards was not shorted any cars. It would be a manifest injustice to permit Edwards to recover $1.4 million from NET on the erroneous premise that there was such a shortage. A new trial is therefore required to "prevent a manifest miscarriage of justice."

CONCLUSION

For the reasons set forth above, the Court should set aside the jury's verdict and enter judgment in favor of NET. In the alternative, the Court should grant a new trial. If the Court does not grant judgment n.o.v. or a new trial, the Court should remit at least all damages attributable to the period subsequent to March 8, 1978 ($949,438) and all damages attributable to Edwards' double-count of damages in this case ($709,731, of which $235,012 is attributable to the period prior to March 8, 1978).

Respectfully submitted,

FRIEDMAN & ATHERTON

By: WILLIAM I. COWIN

Attorneys for New England Toyota Distributor, Inc.

Of Counsel:

Allen Kezsbom
Steven Glickstein
Aaron Stiefel
Kaye, Scholer, Fierman,
Hays & Handler

CERTIFICATE OF SERVICE

I, William I. Cowin, attorney for the defendant, hereby certify that I have today served the foregoing Defendant's Memorandum in Support of its Motion for Judgment N.O.V. or for a New Trial by causing a copy thereof to be delivered to Daniel A. Laufer, Esq., attorney for the plaintiff, at Myers and Laufer, Four Park Street, Concord, N.H.

WILLIAM I. COWIN
William I. Cowin

Dated: May 13, 1982